





REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

C. P. POMEROY,
REPORTER.

VOLUME 130
WITH
NOTES ON CAL. REPORTS.

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ORGANIZATION OF SUPREME COURT.

[Constitution, article 6, section 2.]

§ 2. The Supreme Court shall consist of a chief justice and six associate justices. The court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may,

either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

SUPREME COURT COMMISSIONERS.

[Statutes 1899, page 11.]

Section 1. The Supreme Court of the State of California shall immediately upon the expiration of the term of office of the present Supreme Court Commissioners appoint five persons of legal learning and personal worth as Commissioners of said Court. It shall be the duty of said Commissioners, under such rules and regulations as said Court may adopt, to assist in the performance of its duties and in the disposition of the numerous causes now pending in said Court undetermined. The said Commissioners shall hold office for the term of two years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a Judge of said Court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the Constitution of the United States, and the Constitution of the State of California, and to faithfully discharge the duties of the office of Commissioner of the Supreme Court to the best of their ability. The said Court shall have power to remove any and all members of said Commission at any time by an order entered on the minutes of said Court, and all vacancies in said Commission shall be filled in like manner.

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R U L E S
OF THE
SUPREME COURT
OF THE
STATE OF CALIFORNIA.

RULE I.

ADMISSION OF ATTORNEYS.

1. Applicants for license to practice as attorneys and counselors will be examined in open Court on the first day of each regular term, and on that day only. Until further order the examination will be based upon the following books: Blackstone's Commentaries, Kent's Commentaries, Greenleaf's Evidence (first volume), Story's Equity Jurisprudence, Gould's Pleading, Lube's Equity Pleading, Parsons on Contracts, Pomeroy's Introduction to Municipal Law, Code of Civil Procedure, Civil Code, Constitution of the United States and of the State of California. Persons applying for admission, whether upon examination or motion, must personally appear in Court at the time the application for admission is made. No applicant will be examined unless there shall have been filed with the Clerk of the Court, before the first day of the term at which the application is made, a certificate signed by at least two attorneys of the Court, each of whom shall have been regularly engaged in practice as such attorney for at least four years next theretofore, stating, in substance, that they have, and that each of them has, carefully and diligently examined the applicant touching the qualifications of such applicant in point of learning in the law; that it satisfactorily appeared to them, and to each of them, upon such examination, that the applicant had been engaged in the study of the law for a period of time to be named in

the certificate, naming the place at which, and the person under whom, if any, such study had been prosecuted; that the applicant had, during that time, read certain books of law, which books shall be enumerated in the certificate; and stating any other fact tending to show the character of the attainments of the applicant, and also stating that, in their opinion, the applicant possesses the requisite qualifications in point of learning in the law, to be entitled to be admitted to practice.

FEE.

2. The fee for license must, in all cases, be deposited with the Clerk of the Court before the application is made, to be returned to the applicant in case of rejection.

REJECTION.

3. No person rejected shall be at liberty to renew the application earlier than the third regular term next after such rejection.

RULE II.

TRANSCRIPT.

1. The appellant in a civil action shall, within forty days after the appeal is perfected and the bill of exceptions and the statement (if there be any) are settled, serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the Clerk of the Court from which the appeal is taken.

EVIDENCE OF SERVICE.

2. Written evidence of the service, upon the adverse party, of the transcript shall be filed therewith.

EXTENSION OF TIME.

3. The time above limited may be extended by stipulation, but shall not be extended by the Court more than twenty days; and such extension of time shall be granted only upon good cause shown by affidavit.

BRIEFS.

4. Thirty days after the filing of the transcript, and in cases where the transcript shall be on file at the date when

this rule takes effect, then, within thirty days after such date, the appellant shall file with the Clerk his printed points and authorities, and with it proof of the service of one copy thereof upon the attorney or attorneys of each respondent who shall have appeared separately in the Superior Court. Within thirty days after the service of appellant's points and authorities, the respondent shall file and serve his printed points and authorities; and within ten days after service of respondent's points the appellant may file a reply.

In criminal cases the appellant shall file his points and authorities (with proof of service of a copy thereof on the Attorney-General) within ten days after the filing of the transcript. The Attorney-General shall file and serve his points and authorities within ten days after service upon him of the appellant's points, and within five days thereafter the appellant may file and serve a reply. Such points and authorities may be either printed or written.

EXTENSION OF TIME ON BRIEFS.

5. The time above limited for filing points and authorities shall not be extended except by order of the Court upon stipulation of the parties, or an affidavit showing good cause therefor, and in no case for more than twenty days. No brief shall be filed after oral argument.

EIGHTEEN COPIES OF TRANSCRIPT AND POINTS TO BE FILED.

6. Besides the original there shall be filed seventeen copies of the transcript, and points and authorities, which copies shall be distributed by the Clerk in the manner prescribed by law, and one copy to the Law Library at Los Angeles.

TRANSCRIPT IN CRIMINAL CAUSES.

7. In criminal causes, the printed transcript of the record shall be prepared and filed within thirty days after the appeal is taken. (See Rule VII, Part 2.)

DISPOSITION OF PAPERS.

8. Copies of all printed papers, points, and briefs filed in the Supreme Court in any matter appealed thereto, must be

deposited with the Clerk of the Court from which the appeal is taken; and the copies so deposited shall, by said Clerk, be delivered to the Judge who presided at the trial of the cause in the lower Court.

RULE III.

SUBMISSION OF CAUSES.

The parties may at any time stipulate that a cause be submitted upon printed points and authorities on file, and the Clerk shall immediately place such cause upon a list of cases to be so submitted, and the Court may, at any time thereafter, order the submission of the same.

RULE IV.

CALENDAR FOR ORAL ARGUMENT.

Thirty days before the commencement of a term the Clerk shall, unless otherwise ordered by the Court, place on the calendar for oral argument all cases which have been continued from the previous term for such argument, and also, in the order in which the transcripts were filed, all cases in which points and authorities are on file and in which there is no stipulation to submit on briefs.

RULE V.

DISMISSAL OF APPEAL.

If the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed, on motion, upon notice given. If the transcript, or the points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion. If the respondent shall not file his points and authorities within the time allowed therefor, the cause may be submitted for decision upon the motion of the appellant, on notice thereof to the respondent.

RULE VI.

CERTIFICATE OF CLERK ON MOTION TO DISMISS.

1. On motion to dismiss an appeal for a failure to file the transcript within the prescribed time, there shall be presented the certificate of the Clerk below, under the seal of the Court,

certifying the amount or character of the judgment or order appealed from, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of filing an undertaking on appeal, and that the same is in due form; the fact and the time of the settlement of the bill of exceptions and statement on appeal, if there be any; and also that the appellant has received a duly certified transcript, or that he has not requested the Clerk to certify to a correct transcript of the record, or if he has made such a request, that he has not paid the fees therefor, if the same have been demanded.

AFFIDAVITS.

2. On motion to dismiss the appeal on any other ground than the failure to file transcript within the prescribed time, the moving papers shall consist of the certificate of the Clerk of the Court below, as to any of the matters above mentioned, or of affidavits, or both such certificate and affidavits.

SERVICE OF MOVING PAPERS.

3. Copies of the moving papers, except the transcript, shall be served with notice of the motion.

DISMISSAL OF APPEAL.

4. If an appeal be taken and perfected in the form required by statute, after the expiration of the time limited by law for the taking of such appeal, the respondent may, under the provisions of this rule, move to dismiss such appeal on that ground, whether the time for filing the transcript has expired or not.

RULE VII.

PRINTING OF TRANSCRIPT.

1. All transcripts of records in civil cases shall be printed on unruled white writing paper, ten inches long by seven inches wide, with a margin on the outer edge of not less than two inches wide. The printed pages, exclusive of any marginal note or reference, shall be seven inches long and three and one-half inches wide. The folios, embracing ten lines each,

shall be numbered from the commencement to the end, and the numbering of the folio shall be printed on the left margin of the page. Small pica, solid, is the smallest letter and most compact mode of composition allowed.

TRANSCRIPTS IN CRIMINAL CASES PRINTED.

2. Transcripts in criminal cases are to be printed in accordance with the provisions of Section 1246 of the Penal Code, as amended March 19, 1889.

RULE VIII.

INDEX AND ARRANGEMENT OF TRANSCRIPT.

The pleadings, proceedings, and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover. The *chronological arrangement* of the several parts of the transcript, and a strict compliance with *the other requirements* of this rule, will be exacted of the appellant or party filing the record here in all cases, *by the Court*, whether objection by the opposite party be made or not; and for any failure or neglect in these respects, which is found to obstruct the examination of the record, the appeal may be dismissed.

RULE IX.

MAPS.

Whenever a map or survey forms part of the transcript, it shall not be necessary to furnish more than one copy thereof, which shall be annexed to the transcript filed with and certified by the Clerk, and reference thereto shall be made in the other copies.

RULE X.

PENALTY.

No transcript, or other paper or document, which fails to conform to the requirements of these rules, shall be filed by the Clerk.

RULE XI.

TRANSCRIPT, SERVICE AND CERTIFICATE.

Before the printed transcript (in cases in which a printed transcript is required), is filed, a copy thereof shall be served upon the adverse party, and if there be more than one adverse party appearing by different attorneys, upon the attorney of each party so appearing. If a party shall present to the attorney of the adverse party a transcript on appeal, in a civil cause, and request his certificate that the same is correct, and said attorney, upon such request, shall, for a period of five days, neglect or refuse to join in such certificate, or, if deemed incorrect, shall neglect or refuse, for the same time, to serve upon the party making the request a written statement of the particulars in which the transcript is incorrect, or, upon the presentation of the transcript corrected in the particulars thus specified, shall still neglect or refuse for a period of two days to join in such certificate, the costs of procuring the certificate to such transcript from the Clerk of the proper Court shall be taxed against the party whose attorney so neglects or refuses.

RULE XII.

CLERK MAY PRINT TRANSCRIPTS AND CERTIFY TO SAME.

1. The written transcript in civil causes, authenticated in the mode prescribed by Rule XI, together with sufficient funds to pay the expenses of printing the same, may be transmitted to the Clerk of this Court. The Clerk, upon the receipt thereof, shall file the same and cause the transcript to be printed and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party; and said certificate shall be *prima facie* evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in this Court, subject to be corrected by reference to the written transcript on file. Printed copies thereof shall be furnished as provided in Rule II; and the Clerk shall also immediately transmit, by mail or express, copies to the attorneys of the adverse parties, and note such service on the original.

POINTS WHERE CLERK PRINTS RECORD.

2. The time for filing points and authorities, in cases where the record is printed by the Clerk, shall commence to run from the filing of the printed copy of the transcript.

RULE XIII.

COST OF PRINTING.

The expense of printing transcripts on appeal in civil causes and pleadings, affidavits, or other papers constituting the record in original proceedings upon which the case is heard in this Court, required by these rules to be printed, shall be allowed as costs, and taxed in bills of costs in the usual mode.

RULE XIV.

SUGGESTION OF DIMINUTION OF RECORD.

For the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and upon good cause shown, obtain an order that the proper Clerk certify to this Court the whole or part of the record, as may be required, or may produce the same duly certified without such order. If the attorney or counsel of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion, except when a certified copy of the omitted record is produced at the time, must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE XV.

EXCEPTIONS TO TRANSCRIPT.

Exceptions or objections to the transcript, statement, the bond or undertaking on appeal, the notice of appeal, or to its service, or any technical exception or objection to the record in civil cases, affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken and notified to the appellant, in writing, at least five days before the hearing, or they will not be regarded; and when so noted, it shall be the duty of the appellant to present and file at the hearing of the cause such additional rec-

ord, certificate, or other matter, if such there be, to remove or answer the objection or exception so taken; otherwise such objection or exception, if well taken, shall prevail.

RULE XVI.

SUGGESTION OF DEATH OF PARTY.

Upon the death or other disability of a party, pending an appeal, his representative shall be substituted in the suit by suggestion, in writing, on the part of such representative, or of any party on the record. Upon the entry of such suggestion, an order of substitution will be made, and the cause shall proceed as in other cases.

RULE XVII.

CALENDAR.

Criminal causes shall be placed at the head of the calendar. Other causes shall be arranged on the calendar as the Chief Justice of the Court may direct.

RULE XVIII.

PRINTING OF POINTS, ETC.

In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper and in the same style and form (except the numbering of the folios in the margin) as is prescribed for the printing of transcripts.

RULE XIX.

ORAL ARGUMENT.

No more than one counsel on a side will be heard upon the argument, except in peculiar and important cases; but each defendant who has appeared separately in the Court below may be heard through his own counsel. The counsel of each party to a case appealed shall be allowed only one hour, unless an extension of time be obtained from the Court before the argument is commenced, and in an original proceeding such time as shall be fixed by the Court before the commencement of the argument.

RULE XX.

MOTIONS AND APPLICATIONS—TIME FOR SERVICE OF NOTICE.

1. In all cases where notice of a motion is necessary, unless for good cause shown the time is shortened by the Court, the notice shall be ten days.

HEARING OF MOTIONS AND OTHER APPLICATIONS.

2. For the purpose of hearing motions and other applications of which notice is required to be given, each department will be in session on the first Monday in each month, at 10 o'clock A. M.

RULE XXI.

OPINION TRANSMITTED WITH REMITTITUR.

When a judgment is reversed, or modified, a certified copy of the opinion in the case shall be transmitted, with the *re-mittitur*, to the Court below.

RULE XXII.

WITHDRAWAL OF TRANSCRIPT, ETC.

No paper shall be taken from the Court room or Clerk's office, except by order of the Court. No order will be made for leave to withdraw a transcript for examination, except upon leaving with the clerk a written receipt therefor.

RULE XXIII.

COSTS.

When causes are placed upon the calendar, parties shall be primarily liable for costs as follows:

First—If by the appellant, he shall first be liable.

Second—If by the respondent, or by consent, then both parties.

In civil cases the Clerk shall not be required to remit the final papers until the costs are paid. In all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no directions as to costs of appeal, the Clerk will enter upon the record, and insert in the *re-mittitur* a judgment that the appellant recover the costs of appeal.

RULE XXIV.

DISMISSAL OF APPEAL ON STIPULATION.

An appeal or writ of error may be dismissed at any time, upon and in accordance with the written stipulation of the attorneys of record of the respective parties; and upon and in accordance with such stipulation, the Clerk shall enter such dismissal, and the *remittitur* shall issue thereon in accordance with the terms of such stipulation.

RULE XXV.

INSPECTION OF ORIGINAL PAPERS.

When the inspection of an original paper, which was offered in evidence in the Court below, is shown to be necessary to a correct decision of the appeal, the Court may order the Clerk of the Court below to transmit such original paper, if in his possession, to the Clerk of this Court; and if such paper be in the possession of a party to the action, he may produce the same on the hearing of the cause, or he may, upon motion and notice of the adverse party, be required to produce such paper on the hearing of the cause; and in default thereof, the Court will intend the paper to be, in all respects, as alleged by the opposite party.

RULE XXVI.

REASONS FOR ORIGINAL APPLICATION TO THIS COURT
TO BE STATED.

1. If any application made to the Court for a writ of *mandamus*, *certiorari*, *prohibition*, *procedendo*, or for any prerogative writ to be issued in the exercise of its original jurisdiction, and for which an application might have been lawfully made to some other Court in the first instance, the affidavit or petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which, in the opinion of the applicant, render it proper that the writ should issue originally from this Court and not from such other Court—the sufficiency or insufficiency of such circumstances so set forth in that behalf will be determined by the Court in awarding

or refusing the application. In case any Court, Judge, or other officer, or any Board or other tribunal in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings, and in such case it shall be the duty of the applicant obtaining an order for any such writ to serve or cause to be served upon such party or parties in interest a true copy of the affidavit or petition, and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application in the proceedings, and to produce and file in the office of the Clerk of this Court the like evidence of such service.

MEMORANDUM OF AUTHORITIES.

2. All *ex parte* applications to the Court for the issuance of writs in the exercise of its original jurisdiction shall be in writing and filed with the Clerk, and the same shall be accompanied by a memorandum of points and authorities upon which the application is made.

RETURN AND ISSUANCE OF WRIT.

3. Upon the return day of the alternative writ the respondent may make return, either by demurrer or by answer, or by both. If the return be by demurrer alone, and the demurrer is not sustained, the writ will be ordered to issue without further leave to answer.

STAY OF PROCEEDINGS.

4. When an application is made to this Court for an alternative writ, an order staying the proceedings of any Court or officer, until the return of the writ, will not be made *unless due* notice of the application for the writ shall have been given to all the parties interested in the proceedings.

RULE XXVII.

SETTLEMENT OF BILLS OF EXCEPTION ON DEATH OF JUDGE.

When the Judge before whom an action was tried is dead, or is removed from office, any unsettled bill of exceptions, or statement on motion for new trial therein, may be settled and certified by his successor in office; or, if he be disqualified, by the Judge of the same or an adjoining county. And when the Judge before whom an action was tried becomes disqualified, is absent from the State, or refuses to settle the bill of exceptions or statement on motion for a new trial, such bill of exceptions or statement may be settled and certified before a Judge of the same or an adjoining county.

RULE XXVIII.

APPLICATIONS TO HEAR CAUSE IN BANK.

1. Applications, made before or after judgment pronounced by a department, that a cause shall be heard and decided by the Court in Bank, must be made upon printed petition, addressed to the Chief Justice or the Court, setting forth the question involved in the cause and the reasons why it should be heard by the Court in Bank. If made before judgment, the petition must be filed with the Clerk of the Court at least ten days before the Clerk makes up the calendar. And if made after judgment is pronounced by either of the departments, within twenty days after such judgment. The times herein prescribed shall not be extended by the Chief Justice or any of the Associate Justices or the Court; and the Clerk shall not file a petition after such times have expired. In case of judgments, the petition shall operate as a stay of proceedings until it shall be determined.

WAIVER OF ARGUMENT.

2. A cause submitted to a department without oral argument shall be deemed to be a waiver of an oral argument of the same in Bank, if for any reason the same is thereafter ordered to be heard in Bank; and when the order that the cause be heard in Bank is made, the same shall be at once submitted for decision, unless otherwise ordered by the Court.

RULE XXIX.

AUTHENTICATION OF PAPERS.

In all cases of appeal to this Court from the orders of the Superior Courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law.

RULE XXX.

REHEARINGS AND OPINIONS.

1. All orders granting rehearings, or for hearing in Bank causes decided in departments, shall be signed by the members of the Court assenting thereto, and filed with the Clerk.

APPROVAL OF COMMISSION OPINIONS.

2. The order of the Court approving an opinion of the Commission, and for judgment in accordance therewith, shall be signed by the members of the Court assenting thereto.

OPINIONS WITHIN NINETY DAYS AFTER SUBMISSION.

3. Every opinion which shall have received the assent of a sufficient number of the members of the Court to order the judgment therein directed, shall be filed within ninety days after the submission of the cause in which such opinion is written.

FILING OF OPINIONS.

4. Opinions will be filed in the office of the Clerk in the district where the Court may be in session at the time, but the opinion, if in a case submitted in another district, shall, after filing, be immediately transmitted by the Clerk to the Clerk's office of such district.

Ordered that the foregoing rules be and the same are hereby adopted; that they be published in accordance with the provisions of the statute in that behalf, and the Clerk is directed to cause the said publication to be made by one in-

section in one of the daily newspapers published in San Francisco, Los Angeles, and Sacramento, and that they take effect July 1, 1892, and that thereupon the rules heretofore made be abrogated.

BEATTY, C. J.
HARRISON, J.
PATERSON, J.
SHARPSTEIN J.
DE HAVEN, J.
GAROUTTE, J.

Attest: L. H. BROWN, Clerk.
April 13, 1892.

RULE XXXI.

In all criminal cases, and in all other cases where the State or any officer thereof in his official capacity is a party, and in all cases to which any county may be a party, unless the interest of the county is averse to the State or to some officer thereof acting in his official capacity, no transcript on appeal or brief on behalf of the State or of such county or officer whom the Attorney-General is empowered to represent, shall be received or filed by the Clerk of this Court without proof of the service of such transcript or brief upon the Attorney-General. On such transcript or brief there shall not be printed the name of any person as attorney for the State or for such county or officer of the State, other than the name of the Attorney-General, without the order of this Court or the written consent of the Attorney-General first obtained.

Dated September 4, 1896.

BEATTY, C. J.
GAROUTTE, J.
HENSHAW, J.
VAN FLEET, J.
McFARLAND, J.
TEMPLE, J.

Attest: T. H. WARD, Clerk.

REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

[Crim. No. 604. Department One.—September 17, 1900.]

THE PEOPLE, Respondent v. JAMES F. O'BRIEN, Jr.,
Appellant.

CRIMINAL LAW—RAPE—PREVENTING RESISTANCE—INFORMATION—CERTAINTY—CONJUNCTIVE AVERMENT.—An information for rape charging that the prosecutrix was prevented from resisting the act "by certain intoxicating, narcotic, and anaesthetic substance," administered to her by and with the privity of the defendant, is not demurrable for uncertainty by reason of the conjunctive form of the averment, contrary to the disjunctive enumeration in the statute; though it may be, in such cases, that a disjunctive allegation is permissible.

Id.—UNCONSCIOUSNESS OF PROSECUTRIX—CREDIBILITY—PROVINCE OF JURY.—The credibility of the testimony of the prosecutrix that she was in a state of unconsciousness before and when the act of sexual intercourse was committed was for the jury to determine, notwithstanding the testimony of other witnesses that she did not appear to be unconscious when she was seen riding with the defendant, and other evidence tending to impeach her character for chastity.

Id.—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.—Where there was evidence that the defendant repeatedly administered intoxicating liquor to the prosecutrix, and assumed to drive her home thereafter in the evening, and that after dark, about a mile from the starting place, she was found by witnesses lying on the ground apparently insensible, and was helped into the wagon at the defendant's request, and was taken home in an unconscious state, and it

appeared that some one had had intercourse with her, and there was other evidence pointing to the defendant as the guilty party, the verdict of guilty cannot be disturbed upon appeal for insufficiency of the evidence to support it.

ID.—EVIDENCE—LOADED PISTOL TAKEN FROM DEFENDANT.—Evidence is not admissible to show that several days after the alleged offense a loaded pistol was taken from the defendant by the relatives of the prosecutrix; nor is such pistol admissible in evidence as an exhibit.

ID.—PREVIOUS CHASTITY OF PROSECUTRIX—EVIDENCE IN CHIEF—INFERENCE—REBUTTAL.—It is not admissible for the prosecutrix to testify upon her examination in chief that prior to the occasion of the alleged offense she had never had sexual intercourse with anyone. The previous chastity of the prosecutrix should be inferred by the jury in the absence of evidence to the contrary, and can only be proved by way of rebuttal of attacking evidence.

ID.—INSTRUCTION UPON PRESUMPTION OF CHASTITY—PROVINCE OF JURY—INFERENCE—PRESUMPTION OF INNOCENCE.—It is error to instruct the jury, upon a prosecution for rape, that "the law presumes a woman to be chaste until the contrary is shown." There may be an inference of previous chastity, and the jury should infer it in the absence of evidence; but the jury is the exclusive judge of the weight and validity of the inference. But there can be no legal presumption of chastity against the presumption of innocence, which must prevail until guilt is proved beyond a reasonable doubt.

ID.—IMPROPER BASIS OF INSTRUCTION—LANGUAGE OMITTED FROM PUBLISHED OPINION—PRESUMPTION.—An instruction to the effect that the jury may find on the presumption of chastity against the declarations of any number of witnesses that did not produce conviction in their minds is improperly based on the supposed authority of language used in an opinion, which was omitted in the final publication thereof. It must be presumed that the omission was intentional.

ID.—INSTRUCTION UPON CIRCUMSTANTIAL EVIDENCE—"PROBABILITIES."—It is error to instruct the jury on the subject of circumstantial evidence that "when direct evidence cannot be produced minds will form their judgment on circumstances, and act on the probabilities of the case." Such instruction implies that the jury may act on less than convincing evidence or without the "moral certainty" required by law.

ID.—INSTRUCTION COMPARING WEIGHT OF CIRCUMSTANTIAL AND DIRECT EVIDENCE—MATTER OF FACT.—An instruction relating to the comparative weight or relative value of circumstantial evidence, and the direct evidence of eyewitnesses, improperly charges as to a matter of fact in violation of section 19 of article VI of the constitution. An instruction that eyewitnesses may lie, though true, is not

upon a matter of law, but upon a matter of fact for the consideration of the jury, and carries with it an improper implication in favor of other kinds of evidence.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. John Ellsworth, Judge.

The facts are stated in the opinion.

Frank McGowan, A. A. Moore, Jr., and T. F. Garrity, for Appellant.

Tirey L. Ford, Attorney General, and C. N. Post, Assistant Attorney General, for Respondent.

SMITH, C.—The defendant was convicted of rape. The appeal is from the judgment and from an order denying a new trial. The points urged for reversal are, that the information was insufficient to sustain the judgment; that the verdict was contrary to the evidence; and that there were errors in the instructions and in the admission of evidence.

The offense charged, as alleged in the information, and as defined in the instructions, consisted in the defendant's having sexual intercourse with the prosecutrix, "who (it is alleged) was prevented from resisting said act by certain intoxicating, narcotic, and anaesthetic substance administered to her by and with the privity of" defendant.

The information was demurred to on the ground of uncertainty—the point of the objection being that the substance administered to the prosecutrix was alleged to be "at once intoxicating, narcotic, and anaesthetic," and that the particular kind of substance is not named. But the objection, I think, is untenable. It is well settled that "where the statute enumerates several acts disjunctively, which separately or together shall constitute the offense, the indictment, if it charges more than one of them, which it may do, and that, too, in the same count, should do so in the conjunctive." (*People v. Tomlinson*, 35 Cal. 503; *People v. Thompson*, 111 Cal. 242; *People v. Leyshon*, 108 Cal. 440, and cases cited; Wharton's Criminal Pleading and Practice, sec. 162, 251); and this rule has been applied to cases where several

intents are enumerated in the statute as elements of the offense (*People v. Ah. Woo*, 28 Cal. 206; *Angel v. Commonwealth*, 2 Va. Cas. 231); and also to cases like the present, where different means of perpetrating the offense are enumerated. (*Wingard v. State*, 13 Ga. 396.) Though, in the last case, and in certain other exceptional cases, it may be that a disjunctive allegation is permissible. (Pen. Code, sec. 954; Wharton's Criminal Pleading and Practice, sec. 161, ad fin.)

With regard to the sufficiency of the evidence, the case made by the prosecution was as follows: The prosecutrix was invited by the defendant to enter his father's hotel at Livermore "to have some refreshments"; and there, on his invitation, took a drink of whisky, and afterward another or other drinks either on his invitation or that of others. Defendant proposed to drive her home, which was some miles in the country, and his offer was accepted. On their way out of town, between 6 and half after 6 o'clock, they stopped in front of another saloon, where, though already under the influence of liquor, she took another drink on his invitation. They were passed on the road shortly afterward by two witnesses, one of whom says she was a little bit intoxicated, the other that he could not say whether she was or not. They were next seen by witnesses after dark, about a mile from Livermore, in front of the house of the Christianas. She was then out of the wagon, lying on the road, incapable of motion and presumably insensible, and was lifted into the wagon by the witnesses, who had been called out by the defendant for the purpose. Half a mile or a mile farther on, about a quarter to eight, or perhaps a little earlier, they met the stepmother and uncle of the prosecutrix; and she was then entirely unconscious, and remained so until put to bed. According to her own testimony she remembered nothing, after the second drink at the Livermore Hotel, until 9 or 10 o'clock next day. Other witnesses testified that she was not unconscious when she left the hotel, but this is not inconsistent with her statement that she did not remember what then occurred. From the condition of her clothing and person, the morning after these occurrences, as described by herself and stepmother, it was evident that some one had had connection with her; and from a letter of the defendant, and

his subsequent conduct and admissions, the jury were justified in finding the defendant to be the person to whom the act was to be attributed.

The most serious question in the case was as to the time of the act—that is, whether it took place before or after the prosecutrix became unconscious, or otherwise incapable of resistance. When she was seen at the Christiana house—which may have been an hour or more after leaving town—she was obviously in a helpless condition. But when she left town—if the witnesses are to be believed—she was at most only slightly intoxicated; and, if the act took place before her powers of resistance were destroyed, it was not a crime. On this point there was no direct evidence except that of the prosecutrix that she was unconscious of the act; and there was evidence introduced for the defendant tending to impeach her character for chastity, and otherwise to cast suspicion on her testimony. But as the credibility of her testimony was for the jury to determine, their finding on this point must be accepted.

There was thus evidence tending to prove each of the elements of the crime; namely, the administering of intoxicating liquor, and the perpetration of the act when she was in a state of unconsciousness or in such condition as to be incapable of resistance; and we are, therefore, not at liberty to disturb the verdict or the order denying a new trial on the ground of insufficiency of the evidence.

The errors relied upon for reversal relate partly to the admission of evidence, partly to the instructions, and will be considered *seriatim*.

1. The prosecution was allowed to prove, over repeated objections of defendant, the taking of a loaded pistol from the defendant at a meeting between him and the prosecutrix and her brother and uncle three or four days after the alleged offense; and the pistol was introduced in evidence—the defendant still objecting—as an exhibit in the case. This evidence was clearly inadmissible, and though it is difficult to imagine how it could have influenced the jury to the prejudice of the defendant, yet they, like the counsel for the prosecution and the court, may have perceived some bearing of the evidence on the case that we are unable to discover, and,

in the absence of knowing what this was, it is difficult to determine affirmatively from the record that the defendant was not prejudiced. (*San Jose Ranch Co. v. San Jose Land etc. Co.*, 126 Cal. 322; *People v. Wong Ah Leong*, 99 Cal. 440; *People v. Yee Fook Din*, 106 Cal. 163.) In the view we take of the case, however, it will be unnecessary to determine this question.

2. On the examination of the prosecutrix in chief she was permitted to testify over the objection of defendant, that prior to the occasion of the alleged offense by defendant she had never had sexual intercourse with anyone. This was error. No doubt—as held in the cases cited by the attorney general—the previous chastity or unchastity of the female alleged to be raped may be a material element for the jury to consider; but—as the court in this case instructed the jury—the previous chastity of the prosecutrix is presumed, and it is inadmissible, in advance of attack, to prove her good character, and still less to prove her innocence of specific acts of incontinence. (*People v. Tyler*, 36 Cal. 526; *People v. Rector*, 19 Wend. 579; *People v. Gray*, 7 N. Y. 378; *Dodd v. Norris*, 3 Camp. 519; *Rex v. Clark*, 2 Stark. 241—a case of rape.) In general such evidence—as it simply affirms what is to be inferred—may not be prejudicial. But in this case evidence was subsequently introduced by defendant tending to prove that prosecutrix had been unchaste, and even tending to prove specific acts of unchastity, which she was not called to rebut.

3. On this state of the record the court instructed the jury that “the law presumes a woman to be chaste until the contrary is shown”; and further instructed them in effect that they might find on this presumption against the declarations of any number of witnesses that did not produce conviction in their minds. The instruction was based on the supposed authority of *People v. Kehoe*, as reported in 55 Pac. Rep. 912, where such language is used. But the passage does not occur in the opinion as reported in 123 Cal. 224,¹ and it must be presumed the omission was intentional. (Code Civ. Proc., sec. 1875.) That there may be an inference of the chastity of a woman by the jury, and that the jury, in the absence of evidence to the contrary, should so infer, must

¹ 60 Am. St. Rep. 52.

be admitted. (Code Civ. Proc., secs. 1958, 1960.) But a presumption, by which in our code is meant a presumption of law, is a different thing. In the former case the jury are the exclusive judges of the weight and validity of the inference; in the latter they are bound by the presumption unless controverted by other evidence. (Code Civ. Proc., sec. 1961.) Whether, in any case, there is a legal presumption—as opposed to an inference—of the previous chastity of a woman, need not be determined; but as against the presumption of the innocence of one accused of crime, there can be no such presumption. “There cannot be two presumptions in a criminal case. The accused is presumed to be innocent until his guilt is established beyond a reasonable doubt.” (*People v. Douglass*, 100 Cal. 1, 6; *People v. Strassman*, 112 Cal. 687; *Hunter v. Hunter*, 111 Cal. 261.²) Accordingly, in *People v. Krusick*, 93 Cal. 79, a substantially similar instruction was held to be erroneous, and in *People v. Roderigas*, 49 Cal. 11, it is said, referring to the fact of previous chaste character: “It is not a presumption of mere law to be indulged against the counter-presumption of the innocence of the prisoner on trial upon a charge of crime committed.” The two cases last cited were, the latter, a prosecution for enticing an unmarried female of previous chaste character to a house of ill-fame; the former for the seduction of such a woman under promise of marriage; and as in both cases the previous chastity of the woman was a substantive element of the crime, it was held necessary in the one case to allege, and in the other to prove, it; in which respect the cause differed from the one at bar. But otherwise the cases are the same in principle.

4. The court, after instructing the jury as to the admissibility of circumstantial or presumptive evidence, further instructed them that: “When direct evidence cannot be produced, minds will form their judgments on circumstances, and act on the probabilities of the case.”

The same instruction was given and approved in *People v. Cronin*, 34 Cal. 193; but, on principle, the instruction seems to be clearly erroneous. In its explicit statement it purported merely to state a very common, though not always commendable, tendency of the human mind to act on probabilities and without satisfactory evidence; but it implied

² 52 Am. St. Rep. 180.

that the jury were at liberty to pursue this course. But the law requires the jury to be satisfied or convinced of the guilt of the accused before convicting, and hence permits them to act only on evidence sufficient to produce belief or conviction, or, as expressed in the code, on "that degree of proof which produces conviction in an unprejudiced mind." (Code Civ. Proc., sec. 1826.) "Probability" is mere "likelihood" or "appearance—i. e., resemblance—of truth" (Webster's Dictionary); and in ordinary language the term implies doubt. (Century Dictionary.) To instruct the jury that they may "act on probabilities" means simply that they may act on less than convincing evidence, or without that "moral certainty" required by the law. (Code Civ. Proc., sec. 1826; *People v. Dilwood*, 94 Cal. 90.)

5. The jury was further instructed as follows: "Though in human judicature, imperfect as it must necessarily be, it sometimes happens that error has been committed from a reliance on circumstantial evidence, yet this species of evidence, in the opinion of all those who are most conversant with the administration of justice, and most skilled in judicial proceedings, is not only proper and necessary, but it is sometimes even more satisfactory than the testimony of a single individual who swears that he has seen a fact committed. (*People v. Cronin*, *supra*.) Even persons professing to have been eyewitnesses of that to which they may testify may speak falsely."

This instruction is obviously "a . . . charge to the jury as to the relative value of direct and circumstantial evidence." It therefore comes within the principle of the decision laid down in *People v. Vereneseneckockhoff*, 129 Cal. 497, lately decided, and must be regarded as in conflict with section 19, article 6, of the constitution. The instruction is, indeed, somewhat different from that commented up in the case cited (and possibly, in some respects, not so objectionable; but it is none the less in conflict with the rule there laid down; which is that "the court cannot argue to the jury the relative importance of evidence, except as that is settled by some rule of law"; and that "the law declares nothing as to the relative probative force" of the two species of evidence. Whether what is said by the court is in fact true or otherwise makes, therefore, no difference. In either

case it is forbidden by the constitution and therefore erroneous, and, unless it can be seen not to have been prejudicial, is ground for reversal.

In this case it cannot be determined affirmatively from the record that the defendant was not prejudiced, but rather the affirmative seems probable. The instruction is taken from that of Mr. Justice Park, cited in *People v. Cronin, supra*, and is substantially the same except that, in place of the words "is much more satisfactory," occurring in the original, the words "is sometimes even more satisfactory" are used; and there is added a statement that even eyewitnesses may speak falsely. The instruction as given is therefore true as a fact—which was not the case with the original; but, like the original, it does not enounce a rule of law, but is merely an instruction as to the value or weight of this species of evidence, and obviously designed to be commendatory. So, also, though true in its explicit terms, the instruction seems to imply a caution against being influenced by those cases where error has been committed from a reliance on circumstantial evidence. But such cases should always be present to the minds of those who are called upon to determine the question of guilt or innocence. For they stand as warnings, not of any intrinsic weakness in circumstantial evidence, but of the danger of disregarding that fundamental rule of the law—the indispensable guaranty of liberty and of life—that no man can be held guilty until every reasonable hypothesis in favor of his innocence has been negatived. Ingenious counsel may, indeed, make a bad use of such cases and use them fallaciously as an argument against the weight of circumstantial evidence in general; but this argument is more readily refuted by a consideration of the fact that such mistakes occur also, and perhaps as often, from a reliance on direct testimony; and there is, therefore, neither necessity nor justification for excluding the cases in which such mistakes have occurred from the consideration of the jury, nor in any way belittling their importance. Nor was there any necessity or justification for instructing the jury that witnesses may lie. It is, indeed an unfortunate fact that they often do so. But this, like other facts, is for the consideration of the jury; and there is no rule of law involved in the prop-

osition. The only presumption known to the law is that witnesses speak the truth. (Code Civ. Proc., sec. 1847.) In the instruction here involved a single class—namely, eyewitnesses—are singled out for the observation; which carries with it an implication favorable to other kinds of evidence. On the whole, therefore, the instruction was not only erroneous, but prejudicial to the accused.

I therefore advise that the judgment and order denying a new trial be reversed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed.

Harrison, J., Van Dyke, J., Garoutte, J.

[S. F. No. 1716. Department One.—September 17, 1900.]

GUISEPPE RASPADORI, Respondent, v. FRANK
CRESTA, Appellant.

COMPLAINT UPON NOTE—DATE OF EXECUTION—CLERICAL ERROR—COPY OF NOTE—WRITTEN NOTICE OF PAYMENT—PRESUMPTION UPON APPEAL.—In a complaint upon a note, the date of the year in an averment of its execution, which is precisely four years subsequent to the date of the note which is set out in full in the complaint, and is also subsequent to the date of a written notice of payment required by the terms of the note to be given for a period of thirty days, which described the note by its date, and which was served more than thirty days before the commencement of the action, which it appears was commenced less than thirty days after the alleged date of execution of the note, is obviously a clerical error, which must be presumed upon appeal, in the absence of the evidence, to have been corrected by the witnesses; and the written notice of payment cannot be considered as prematurely given.

ID.—ANTEDATING OF NOTE—DELIVERY AFTER WRITTEN NOTICE—DATE IMMATERIAL—STIPULATED TIME OF PAYMENT—MATURITY OF CAUSE OF ACTION.—The date of the delivery of the note was not material to the cause of action. Even if it was antedated and delivered

after the written notice of the payment, the notice would still apply to the date stated in the note, and would make it payable by agreement of the parties thirty days after the written demand for payment. It is sufficient for the maturity of the cause of action that the written notice was given more than thirty days before the commencement of the action.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank H. Dunne, Judge.

The facts are stated in the opinion.

Frank I. Kingwell, for Appellant.

T. Z. Blakeman, for Respondent.

CHIPMAN, C.—Action on promissory note executed by defendant to plaintiff. Plaintiff had judgment, from which defendant appeals on the judgment-roll. The note sued upon was for six hundred dollars, and was dated May 22, 1894, and among other things contains the following provision: "Thirty days after written notice is served upon me for payment, I promise to pay," etc. The complaint alleges as follows: "That heretofore, to wit, on the twenty-second day of May, 1898, . . . the defendant . . . made and delivered to the plaintiff . . . his promissory note in words and figures as follows, to wit." Then follows copy of the note showing its date to be May 22, 1894, and not May 22, 1898. The written notice of demand by plaintiff upon defendant is dated May 2, 1898, and describes the note for which payment is demanded to be "the promissory note dated May 22, 1894, made by you to me for six hundred dollars," etc. The complaint was verified and was filed June 6, 1898, more than thirty days after notice of demand, and there was no demurrer filed. The answer denies no allegation of the complaint except as to notice of demand for payment; this is an admission that defendant executed the note set out in the complaint. The court found that the notice was served on defendant on May 2, 1898, as alleged in the complaint; that defendant has not paid the amount of the note, or any part of it, and that the whole thereof was due and unpaid when this action was begun. The findings also show that oral and documentary evidence was introduced by plaintiff, and that defendant testified in his own behalf.

The only point made by appellant is that the note was delivered on May 22, 1898, and the notice of demand was therefore prematurely made on May 2, 1898, as no notice to pay could lawfully be given until after delivery of the note.

The complaint speaks of the note as having been "made and delivered" on May 22, 1898, while the notice given corresponds with the actual date of the note, to wit, May 22, 1894, and apparently refers to the note sued upon. The date of the execution and delivery of the note as stated in the complaint is obviously a clerical error which, in the absence of the evidence, and in support of the findings and judgment, we must presume was explained by the witness. The court found that the note referred to in the notice was the note sued upon, and that the notice was served May 2d, and not on May 22d as appellant assumes, and these findings cannot be questioned on this appeal. Furthermore, if defendant delivered the note after he received the notice, and it was antedated, it would not follow that the notice was premature; it would still apply to the note as actually dated, and the action could be brought after thirty days from service of notice. The date of the note was not material; it was payable thirty days after demand for payment by agreement of the parties (*Collins v. Driscoll*, 69 Cal. 550); and the court found that this notice was given more than thirty days before the action was commenced.

There is no merit in the appeal, and the judgment should be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

[Crim. No. 628. Department One.—September 17, 1900.]

THE PEOPLE, Respondent, v. E. J. COLE, Appellant.

CRIMINAL LAW—FORGERY.—In order to constitute the crime of forgery it is essential that there should be the making of a writing which falsely purports to be the writing of another.

ID.—CHECK DRAWN BY DEFENDANT.—An information charging the defendant with uttering and attempting to pass a forged and counterfeited check, which shows upon its face that the instrument alleged to be forged was a check drawn and signed by the defendant himself, does not state a public offense; and the facts that such check purported to be indorsed by the person whose check was alleged to have been forged, and that the defendant had no funds in the bank on which it was drawn, are immaterial.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order refusing a new trial. E. C. Hart, Judge.

The facts are stated in the opinion.

Charles M. Beckwith, for Appellant.

Tirey L. Ford, Attorney General, and C. N. Post, Assistant Attorney General, for Respondent.

COOPER, C.—Defendant was convicted of the crime of forgery and sentenced to a term of eight years in the state prison at Folsom. He brings this appeal from the judgment and from an order denying his motion for a new trial. The charging part of the information was as follows, to wit:

“The said E. J. Cole, on the — day of August, A. D. 1899, at the said county of Sacramento, in the said state of California, and before the filing of this information, did then and there willfully, unlawfully, and feloniously utter, publish, and attempt to pass to one Gus Lavenson, a certain false, forged, and counterfeited check as the true and genuine check of one S. B. Smith, for the payment of ten dollars, which aforesaid false, forged, and counterfeited check is in the words and figures following, to wit:

“ ‘Sacramento, Cal., Aug. 31, 1899.

“ ‘National Bank of D. O. Mills & Co., pay to E. J. Cole, or order, Ten Dollars, \$10.00.

“ ‘(Signed) E. J. COLE.’

“ [Indorsed on back] : S. B. Smith.

“ United States revenue stamp two cents on face marked, ‘8-31-99. E. J. C.’

“ With the intent then and there to prejudice, damage, and defraud the said Gus Lavenson ; he, the said E. J. Cole, then and there well knowing the said false, forged, and counterfeited check to be false, forged, and counterfeited.”

The information charges the defendant with uttering and attempting to pass the check therein set forth. A demurrer was filed to the information upon the ground that it does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code, and that the facts therein stated do not constitute a public offense. We think the demurrer should have been sustained. The gist of the offense attempted to be charged was the uttering and attempting to pass the check therein described, “well knowing the said false, forged and counterfeited check to be false, forged, and counterfeited.” But the information, while it states that the check was forged and counterfeited, shows upon its face that it was not. It is the check of defendant drawn on the National Bank of D. O. Mills & Co. It is signed by defendant. He had the right to draw and sign such check, and for all that appears from the information he had ample funds in the bank upon which the check was drawn to meet it. Whether he did or not, he had the right to draw the check in the manner and in the form it is drawn, and the bank may have been willing to pay it and charge it to his account. It certainly is not a forged and counterfeited check. If the defendant drew a check having no funds at the bank, and attempted to get money on it by falsely representing that he had funds in the bank to meet it, that might constitute an offense, but not the offense charged in this information. Again, it is charged in the information that defendant attempted to pass the check as the true and genuine check of one S. B. Smith. It is difficult to conceive how the check could be passed as the true and genuine check of S. B. Smith when it shows on its

face that it is the check of E. J. Cole. It would be like saying this horse is a black horse and at the same time showing a white horse. It is claimed that the indorsement of "S. B. Smith" was forged. If so the information should have so stated. It shows that the check was indorsed "S. B. Smith," and we must presume that S. B. Smith indorsed it as stated in the information. It is not even hinted that the indorsement was forged or made without the authority of Smith. The information must state the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. It must state the particular circumstances of the offense charged when they are necessary to constitute a complete offense. (Pen. Code, secs. 950, 952.) It was said by this court in the early case of *People v. Tomlinson*, 35 Cal. 506: "The purpose of the statute against forgeries is to protect society against the fabrication, falsification, and the uttering, publishing, and passing of forged instruments, which, if genuine, would establish or defeat some claim, impose some duty, or create some liability, or work some prejudice in law to another in his rights or person or property. Hence, without much conflict, if any, it has been held from the outset that the indictment must show that the instrument in question can be made available in law to work the intended fraud or injury."

It was said by this court, in speaking of the crime of forgery, in *People v. Bendit*, 111 Cal. 277¹: "When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely purports to be the writing of another. The falsity must be in the writing itself—in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not."

In this case the instrument set forth in the information as the genuine check of S. B. Smith does not purport to be

¹ 52 Am. St. Rep. 186.

such check. In fact, it shows as plainly as the English language can speak that it is not. The information shows the check to bear the indorsement "S. B. Smith," but the indorsement is no part of the check. The contract of the indorser is a different and distinct contract from that of the maker. His liability is only conditional and dependent upon circumstances that may never transpire.

We advise that the judgment and order be reversed and the cause remanded, with directions to the lower court to sustain the demurrer to the information.

Chipman, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded, with directions to the lower court to sustain the demurrer to the information.

Garoutte, J., Van Dyke, J., Harrison, J.

[L. A. No. 600. Department One.—September 17, 1900.]

AUGUSTA BEHLOW, Appellant, v. SOUTHERN PACIFIC RAILROAD COMPANY et al., Respondents.

DEED—CONDITION SUBSEQUENT—USE FOR RAILROAD PURPOSES—IRREGULAR USE—BREACH NOT SHOWN.—A condition subsequent in a deed to a railway company that, if the land conveyed is not used for railroad purposes only, it is to revert to the grantors, without limiting or defining the extent of the use, or the character or frequency of trains to be operated over it, is not broken by an irregular use of the land for railroad purposes, ranging from daily use to use at intervals of several months.

ID.—STRICT CONSTRUCTION OF CONDITIONS SUBSEQUENT—FORFEITURE NOT FAVORED.—Conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication, and are to be construed strictly against a forfeiture, which is not favored in law. Conditions providing for a forfeiture are to be construed liberally in favor of the holder of the estate, and strictly against an enforcement of the forfeiture.

ID.—AGREEMENT FOR STATIONS—CONSIDERATION OF GRANT—PERSONAL COVENANT.—A provision in the deed by which the railway company agrees, as a further consideration of the grant, to place two

stations at a location to be selected by the grantor, at which all trains must stop, is not a condition upon which the estate is granted, and is not available to defeat the estate created by the grant, but is merely a personal covenant on the part of the grantee.

ID.—STATUTE CONCERNING OPERATION OF RAILROADS—REVERTER TO PLAINTIFF—INSUFFICIENT SHOWING.—The plaintiff in an action to quiet title, who depends for recovery upon showing that land granted by the plaintiff's grantor for railroad purposes has reverted to the plaintiff as successor of the original owner, cannot invoke the statute of April 15, 1880 (Stats. 1880, p. 43), to establish such reverter, if no facts are alleged or shown to bring the case within that statute, or to establish that there has been a failure to operate trains upon the road for the period of six months as required by that act.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

Walter F. Haas, for Appellant.

The limitation in the deed qualifies the grant, and shows the intent of the parties to grant a mere right of way or easement for railroad purposes, and such intent must prevail. (*Faivre v. Daly*, 93 Cal. 665; *Martin v. Lloyd*, 94 Cal. 195; *In re Vance*, 100 Cal. 425; *Morrison v. Wilson*, 30 Cal. 344; *Pellisier v. Corker*, 103 Cal. 516.) After the acquisition of the right of way by the Southern Pacific Railroad Company, the easement was abandoned and lost. The act of April 15, 1880, having been enacted before the deed was executed, was part of the contract, and the title reverted thereunder to the plaintiff, as successor in interest of the original owner, for abandonment of the operation of the railroad. (Stats. 1880, sec. 1, p. 43; *Brown v. Kling*, 101 Cal. 299.)

Bicknell, Gibson & Trask, for Respondents.

There is no question that a railroad corporation may acquire the fee of lands for the sole purpose of operating a railroad thereover. (Civ. Code, secs. 354, 465, 467, subd. 4; *Nicoll v. N. Y. etc. R. R. Co.*, 12 N. Y. 121; 12 Barb. 460; *Yates v. Van De Bogert*, 56 N. Y. 526; 19 Am. & Eng. Ency. of Law, 806-10; 1 Rorer on Railroads, 78; *Page v. Helnberg*

40 Vt. 81.¹) The estate granted by the deed was not an easement, but an estate in fee upon condition subsequent. (2 Blackstone's Commentaries, 107.) A forfeiture for breach of a condition subsequent is not favored, and the condition is to be construed strictly against the grantor, and against a forfeiture. (4 Kent's Commentaries, 129, 10th ed., 150; Civ. Code, sec. 1422; *Cleary v. Folger*, 84 Cal. 316, 321²; *People v. Perry*, 79 Cal. 105, 121; Bishop on Contracts, 2d ed., sec. 418; *Morrill v. Wabash etc. Ry. Co.*, 96 Mo. 174.) Appellant's case is not brought by the complaint, nor by the stipulated facts, within the terms of the statute of April 15, 1880. No forfeiture of any kind is pleaded or shown. A forfeiture must be pleaded. (Bliss on Code Pleading, 3d ed., sec. 227; *Morenhaut v. Wilson*, 52 Cal. 263; *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534.)

HARRISON, J.—Suit to quiet title. The land involved in the action is a strip forty feet in width, lying within block 55 of Ramona, in the county of Los Angeles. Both parties derive title under a common grantor, the San Gabriel Wine Company. The conveyance to the defendant's grantor, the San Gabriel Valley Rapid Transit Railway Company, was made February 7, 1888, and granted, bargained, and sold to it, its successors and assignees forever, the strip of land described in the complaint, and other lands, and contained this provision: "The conveyance of these lands is made for railroad purposes only, and, if not so used, then it is to revert to the parties of the first part." The conveyance to the plaintiff was made March 20, 1888, and was a grant of the entire block 55. These conveyances were introduced in evidence, and in addition thereto the parties made an agreed statement of facts upon which the cause was submitted to the court. In this stipulation it was agreed that prior to the commencement of this action the Southern Pacific Railroad Company had acquired all the rights of the San Gabriel Wine Company and of the San Gabriel Valley Rapid Transit Railway Company. Judgment was rendered in favor of the defendants, and a motion of the plaintiff for a new trial was denied. From this order she has appealed.

¹ 94 Am. Dec. 378.

² 18 Am. St. Rep. 187.

The aforesaid grant from the San Gabriel Wine Company to the San Gabriel Valley Rapid Transit Railway Company created in the grantee an estate in fee in the lands described in the complaint, determinable upon the nonperformance of the condition therein specified. This being a condition subsequent, its terms are to be strictly construed. "Conditions subsequent are not favored in law and are construed strictly because they tend to destroy estates." (4 Kent's Commentaries, 129). Forfeitures are not favored in law, and conditions providing for the forfeiture of an estate are to be construed liberally in favor of the holder of the estate and strictly against an enforcement of the forfeiture. (Civ. Code, sec. 1442.) "Conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication, and are construed strictly." (Washburn on Real Property, 447.) By the terms of the above conveyance the only condition under which the land is to revert to the grantor is in case it shall not be used for railroad purposes, and it was agreed as a fact herein that the Southern Pacific Railroad Company, has, from time to time, ranging from daily use to use every few months, but at no stated times, operated gravel trains for its own use and for hire on said Rapid Transit Railway, across and over the premises described in the complaint, to the junction of said transit railway with the defendant's overland or trunk line at Ramona, from which point said gravel trains were hauled over said trunk line eastward and westward to various points thereon.

Upon the fact thus stipulated it must be held that a breach of the condition named in the grant has not been shown. The terms of that condition do not limit or define the extent of the use, or the character or frequency of the trains that are to be operated over the land; and it cannot be maintained as a proposition of law that the running of gravel trains, as aforesaid, is not a use of the land for railroad purposes.

The provision in the above conveyance to the San Gabriel Rapid Transit Railway Company that, "as a further consideration for the grant of this land, the parties of the second part agree to place two stations, at one of which all trains must stop—location of stations to be selected by the party

of the first part," is not available to defeat the estate created by the grant. This provision is not made a condition upon which the estate is granted, but is merely a personal covenant on the part of the grantee.

The plaintiff is not entitled to invoke the provisions of the act of April 15, 1880. (Stats. 1880, p. 43.) She has made no reference to the act in her complaint, nor has she alleged or shown any facts under which she can avail herself of the provisions of this act. In the agreed statement of facts it appears that the Southern Pacific Railroad Company acquired the rights of the Rapid Transit Railway Company "prior to the commencement of this action," and that prior to such acquisition the Rapid Transit Railway Company operated regular passenger and freight trains daily over the road. The date at which the Southern Pacific Railroad Company acquired the property is not shown in the record, and consequently it does not appear that there had been, for six months prior to the commencement of the action, any failure to operate trains upon the road as required by the act of 1880.

The order is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[L. A. No. 876. Department One.—September 17, 1900.]

ROSE PROCTER, Respondent, v. SOUTHERN CALIFORNIA RAILWAY COMPANY, Appellant.

ACTION FOR DAMAGES—EJECTION OF RAILWAY PASSENGER—PLEADING—INJURY TO "GOOD NAME."—In an action to recover damages for the unlawful ejection of the plaintiff from the passenger cars of the defendant railway company, no damages can be allowed for injury to the "good name" of the plaintiff. An averment of such injury in the complaint renders it subject to a demurrer for uncertainty, and is subject to a motion to strike it out.

ID.—MISJOINDER OF CAUSES OF ACTION.—Where the injury to plaintiff's "good name" is not alleged as a separate cause of action, but only as one of several injuries alleged, the complaint is not thereby

rendered subject to a demurrer for misjoinder of causes of action.

ID.—ABSENCE OF EVIDENCE—FINDING—HARMLESS SURPLUSAGE.—Where no evidence was introduced at the trial to show any injury to plaintiff's "good name," the averment thereof in the complaint and a finding based upon such averment will be deemed harmless surplusage, which could not have prejudiced the defendant, and will not be held ground for reversal upon appeal.

ID.—SEPARATION OF PLAINTIFF FROM BAGGAGE—PROPER EVIDENCE—DAMAGES OCCASIONED—DISCRETION.—In such action it is proper to show that the plaintiff's baggage was carried away from the plaintiff when ejected from the cars, and that plaintiff was thereby compelled to buy additional clothing; and the mental and physical distress of plaintiff, and any pecuniary loss thereby occasioned, may be taken into account in fixing the damages. Such damages are not susceptible of computation, and are within the sound discretion of the judge or jury passing upon the evidence.

ID.—IMPROPER ITEMS OF COMPENSATION—PRICE OF CLOTHING—GENERAL DAMAGES.—The price of the clothing purchased is not a proper item of compensation in damages, and a special allowance therefor should be omitted from the judgment. The damages for separation from the baggage and for any loss or inconvenience thereby occasioned must be deemed compensated by the finding of general damages.

ID.—DEPRIVATION OF THROUGH TICKET—COST OF PASSAGE FROM PLACE OF EJECTION.—The plaintiff is entitled to recover the cost of a ticket from the place of wrongful ejection to the place of the plaintiff's destination, as damages for the wrongful taking from plaintiff by the conductor of a through ticket belonging to the plaintiff.

ID.—DAMAGES NOT EXCESSIVE.—Under the circumstances of this case, an award of general damages in the sum of four hundred and sixty dollars and fifty cents for the unlawful ejection of the plaintiff from the cars of the defendant is held not excessive, without taking into account any injury to the good name of the plaintiff.

APPEAL from a judgment of the Superior Court of Los Angeles County. M. T. Allen, Judge.

The facts are stated in the opinion.

C. N. Sterry, and Henry J. Stevens, for Appellant.

Winder, Creighton & Davis, and F. G. Hentig, for Respondent.

GRAY, C.—The defendant appeals from a judgment in plaintiff's favor and from an order denying a new trial.

The action is to recover damages for an unlawful ejection of plaintiff by defendant from one of its passenger trains at Pasadena. The case was tried before the court without a jury, and plaintiff was awarded damages in the amount of five hundred and seventy-five dollars. The defendant admitted that its act in taking plaintiff's ticket and ejecting her from the train was wrongful.

It appears that plaintiff, a colored woman, was traveling on a round trip ticket from Cincinnati, Ohio, and boarded defendant's train at Los Angeles, intending to return to Cincinnati. A conductor of defendant, on examining her ticket, directed her to write her name, which she did. He then told her it was not her name on the ticket and that the ticket was bought in Los Angeles, and repeated this two or three times. Plaintiff's name and her correct description were on the ticket. Plaintiff informed him that "we [meaning herself and another colored woman who was with her] bought these tickets at Cincinnati." The conductor then said: "You will either have to pay your way or get off at the next station." He retained plaintiff's ticket, and on her subsequently addressing him with the inquiry, "Can you tell me what is the matter with these tickets, so I can write to Mr. Near, the gentleman who bought the tickets for me, right away?" he made no reply. The plaintiff and her companion testify that the conductor talked loud to them, and the plaintiff says: "He spoke very abrupt at the first when he contradicted our name was on the ticket." A witness for defendant, Thomas Duzan, testifies that the woman "broke out crying," when talking with the conductor. The plaintiff, as a witness, in describing the effect of the conductor's conduct, says: "Well, I felt very bad, and also I felt like the ground could just open and swallow me when I was put off at Pasadena. There was every eye on us, looking at us." Lizzie Riley was asked, "What was the manner of this conductor?" to which she replied: "'Well,' he says, 'I am going to take them up, and if you want to go on, pay your fare, or else get off.' " Presumably, the manner of the conductor was illustrated in this answer of the witness, and it was doubtless upon this

as well as upon the testimony of plaintiff that the trial court based the finding that the conductor "said to plaintiff in an insolent and impudent manner, in a loud voice, and within the hearing of the other passengers on said car, 'You bought this ticket in Los Angeles and you will have to get off this car or pay your fare.' " Plaintiff's baggage was carried on to Cincinnati, leaving her with no clothes except those she was wearing, and she was compelled thereby to buy clothes costing thirty-seven dollars and twenty-five cents.

It was stipulated that the cost of a ticket such as that taken from plaintiff was seventy-seven dollars and fifty cents.

The complaint states the facts for the most part in the form usual in actions of this character. There was a motion to strike out parts of the complaint, and a demurrer for uncertainty and misjoinder of causes of action upon which the appellant bases his most serious contention for a reversal. The parts of the complaint necessary to be stated on this point are as follows: "That the cost of a first-class ticket and a first-class passage from the town of Pasadena on the trains of defendant, over the route hereinbefore mentioned and described, to the said city of Cincinnati was at the time mentioned one hundred and twenty dollars. . . . Plaintiff alleges that said ticket was in every way regular; that the same was the property at all times of the plaintiff; that plaintiff's name was Procter, as stated in this complaint; that said ticket entitled plaintiff to be a passenger upon the said train from the city of Los Angeles to the said town of Barstow; and that defendant wrongfully, willfully, and with intent to harass and annoy plaintiff, caused plaintiff to leave the said train at an intermediary station, to wit, the said Pasadena; that said defendant so caused plaintiff to leave the said train without any lawful cause, and refused to carry plaintiff according to its contract in said ticket as aforesaid, and at said station of Pasadena left plaintiff to pursue her journey on foot or to return to said city of Los Angeles; that by reason of the said conduct upon the part of defendant, plaintiff was unable to complete her journey to the said city of Cincinnati, Ohio, and was put to great trouble and expense, and suffered great loss thereby, and was injured and wounded in her feelings and good name, and suffered great distress, and that by rea-

son of the said premises herein mentioned said plaintiff has suffered damages of and by defendant in the sum of five thousand dollars (\$5,000).

"Wherefore, plaintiff prays judgment against defendant, the Southern California Railway Company, a corporation, for the sum of five thousand dollars and costs of suit."

Appellant contends that his motion to strike from the complaint the words "and good name" should have been granted, and we think this contention correct. The plaintiff's action was based on the act of the conductor in taking away her ticket and ordering her off the train, and she was not entitled to recover for any injury to her good name occasioned thereby. (*Schmitt v. Milwaukee St. Ry. Co.*, 89 Wis. 195.) It seems to be conceded that there was no evidence given at the trial to show that she had suffered any injury to her good name. The words should have been stricken out as surplusage, and we think even on this appeal they should be regarded as surplusage and entirely immaterial. We may also regard the same language in the findings as immaterial and **reject it as having no support in the evidence**; and yet if the findings without these words support the judgment, as we think they do, it should not be reversed merely on account of the technical error of the court in refusing to strike them out or in failing subsequently to treat them as immaterial. (*Sloane v. Southern California Ry. Co.*, 111 Cal. 668.) Where it can be seen that the damages found by the court are not excessive, on the facts as they were developed at the trial, the case should not be reversed merely because the court inserted something in the finding that had no foundation in the evidence. This can best be illustrated by an examination of the finding complained of, which is as follows:

"The ticket of plaintiff was in all respects regular. The action of defendant's train agent Brown in thus causing plaintiff to leave the train was wrongful, and plaintiff thereby was unable to complete her journey to Cincinnati; she was thereby put to great trouble, and was thereby injured and wounded in her feelings and good name, and thereby defendant caused plaintiff to suffer damages in the sum of four hundred and sixty dollars and fifty cents, which sum the court finds as plaintiff's general damages in the premises."

We think under all the circumstances that four hundred and sixty dollars and fifty cents was not an excessive amount to compensate plaintiff for the trouble and injury she suffered by reason of the wrongful acts of defendant, without taking into account any injury to her good name.

Had the words "and good name" been stricken out, the complaint would have been free from any serious objection, and though, perhaps, the complaint with those words left in was demurrable, and the court erred as well in overruling the demurrer as in not granting the aforesaid motion, yet we are confident that the defendant could not have been misled or in any way prejudiced thereby; and after the case has gone to judgment it will not be reversed for mere error, when it can be seen that no substantial right of the party was thereby prejudiced. (*Sloane v. Southern California Ry. Co.*, *supra*; *Irish v. Sunderhaus*, 122 Cal. 308; *Alexander v. Central Lumber etc. Co.*, 104 Cal. 532.) The injury to "good name" was not alleged as a separate cause of action in the complaint, but only as one of several injuries resulting to plaintiff from the one cause of action alleged. There was, therefore, no misjoinder of "causes of action."

It was proper to show that plaintiff was separated from her baggage by the act of defendant as one element of damage, and we think there was no error in permitting her to show that she was compelled thereby to buy additional clothing, but we do not think the measure of damages, to wit, the price of the clothing so purchased, adopted by the court was the proper one. The fact that plaintiff's trunk was carried on to Cincinnati no doubt resulted in some pecuniary loss, which might have been shown and taken into account in fixing the damages. Also the fact that a woman was separated from her baggage, several thousand miles from her home, is no inconsiderable trifle in estimating the amount of damage resulting from the mental and physical distress that she suffered. Such damages are not susceptible of computation, but their amount is within the sound discretion of the judge or jury hearing the evidence.

Appellant complains that the findings in several particulars are not supported by the evidence. A careful examination of the findings and evidence in connection with these

objections discloses that in many of the said particulars the findings have ample support in the evidence, and in the others the findings relate to facts which are merely probative and are not essential to uphold the judgment.

The general damages fixed do not appear to be excessive. We think, also, that the plaintiff was entitled to recover seventy-seven dollars and twenty-five cents, the stipulated cost of a ticket from Pasadena to Cincinnati. But the thirty-seven dollars and twenty-five cents, given plaintiff in the judgment on account of clothes, we think should not have been allowed, for the reason already stated, and also because we think the plaintiff properly compensated for any injury occasioned by being separated from her trunk in the general damages given her in the judgment.

We therefore advise that the judgment and order denying a new trial be reversed, unless the plaintiff shall, within thirty days after the filing of the *remittitur* in the superior court, file with the clerk and give to the defendant a stipulation remitting from the judgment the sum of thirty-seven dollars and twenty-five cents. If such stipulation be so filed and delivered, the superior court should be directed to amend the judgment in conformity therewith, and thereupon the judgment and order should stand affirmed, appellants to recover the costs of the appeal.

Cooper, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed, unless the plaintiff shall, within thirty days after the filing of the *remittitur* in the superior court, file with the clerk and give to the defendant a stipulation remitting from the judgment the sum of thirty-seven dollars and twenty-five cents. If such stipulation be so filed and delivered, the superior court is directed to amend the judgment in conformity therewith, and thereupon the judgment and order stand affirmed, appellants to recover the costs of the appeal.

Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 2315. Department Two.—September 17, 1900.]

HANNAH WALL et al., Respondents, v. BRIDGET MINES and GIRLS' DIRECTORY ORPHAN ASYLUM, Intervenor, Appellants.

CORPORATION—ORPHAN ASYLUM—EXISTENCE DE FACTO—SUPPORT OF FINDING.—A finding that an orphan asylum is not a *de facto* corporation is sustained by evidence tending to show that there were no meetings of the members or trustees, no election of officers, no by-laws adopted, no certificates of shares or membership issued, no seal adopted or used, no records or minutes kept, and no corporate acts of any character performed, and that the institution was managed after as it had been before the attempt to incorporate.

Id.—BENEVOLENT CORPORATION DE JURE—VERIFICATION OF ARTICLES—AFFIDAVIT—MANDATORY STATUTE.—In order to constitute a benevolent corporation *de jure*, the articles of incorporation must be verified as required by section 290 of the Civil Code; and there can be no verification within the meaning of that section requiring that certain facts to be set forth in the articles "must be verified by the officers conducting the election" otherwise than by affidavit of those officers. The statute requiring such verification is mandatory, and not directory.

Id.—AUTHORITY OF SECRETARY OF STATE—CERTIFICATE OF INCORPORATION—PREREQUISITES TO VALIDITY—CERTIFICATE OF COUNTY CLERK—COPY OF ARTICLES.—The secretary of state has on authority to issue a certificate of incorporation without first receiving a copy of the articles of incorporation certified by the county clerk, showing that the steps prerequisite to the assumption of corporate powers have been complied with.

Id.—CERTIFICATE NECESSARY TO INCORPORATION—CERTIFICATE TO ISSUANCE OF PREVIOUS CERTIFICATE—FAILURE OF PROOF.—The certificate of incorporation referred to in section 296 of the Civil Code, required to be issued by the secretary of state, is requisite to give the incorporation a *de jure* existence. A second certificate signed by him, merely reciting that articles of incorporation were filed in his office on a certain date, on which a certificate of incorporation thereof was issued by him, is not admissible proof of the first certificate, and fails to prove a compliance with the law.

Id.—PLEADING—AVERMENT OF INCORPORATION—FORMER ACTION.—The averment of the incorporation of the orphan asylum intervenor made in the complaint in a former action by the same plaintiffs in which the parties defendant and the issues were not the same,

cannot bind or estop the plaintiffs from denying the incorporation of the intervenor in this case.

ID.—AVERMENT OF COMPLAINT AND ANSWER TO INTERVENTION—AMENDMENT OF ANSWER—INCONSISTENCY—DISCRETION—ABANDONMENT OF ISSUE.—Where the complaint of plaintiffs and the answer of plaintiffs to the intervention of the orphan asylum alleged its incorporation, the court had discretion to allow the answer to the intervention to be amended by denying its incorporation, notwithstanding the inconsistency of the averments. Though the complaint ought also to be amended likewise, yet the failure to do it being immaterial to the issue between plaintiffs and defendants, the amendment of the answer to the intervention may be deemed as in effect an abandonment of the issue presented by the complaint.

ID.—COMPROMISE OF PREVIOUS SUIT—SPECIFIC PERFORMANCE—MORTGAGE OF REAL ESTATE—TITLE—BENEFICIAL INTERESTS OF THIRD PARTIES.—In an action to enforce the specific performance of a compromise of a previous suit brought by the same plaintiffs against the same and other parties defendant to enforce a trust against one who is defendant in both actions, in favor of an orphan asylum as an alleged corporation—by which compromise it was stipulated that the corporation had no existence, and that all the real estate in controversy belonged to such defendant, as legal owner, and that a specified piece thereof should be mortgaged and specified sums be paid to the plaintiffs—a decree requiring her to mortgage the entire interest in that property is proper. Any beneficial interests asserted by her to be in codefendants in the previous suit, not made parties to the present action, by reason of an alleged trust declared in the articles of incorporation in favor of a society of which such codefendants were members, are not to be considered in enforcing such compromise.

ID.—INVALIDITY OF TRUST—INVALID CORPORATION.—No valid trust can be created in favor of third parties as members of an unincorporated society in a corporation which has no legal existence *de facto* or *de jure*; and third parties cannot have an interest in property as members of an alleged corporation which has no interest in such property.

ID.—INTERESTS IN UNINCORPORATED SOCIETY NOT INVOLVED.—The interests of third persons as members of an unincorporated society which is not made a party to either action, no issue respecting which was presented or drawn in question apart from the illegal corporation, are not involved, and cannot be considered.

ID.—CONSENT TO COMPROMISE BY CODEFENDANTS—STIPULATION SIGNED BY ATTORNEY—SUPPORT OF FINDING.—Evidence that the codefendants in the previous suit not made parties to the present action for a specific performance of the compromise verbally consented

and agreed thereto, and that the stipulation for the compromise was signed by their attorney by their authority and consent, is sufficient to support a finding in favor of the authority of the attorney to enter into the stipulation.

ID.—AUTHORITY OF ATTORNEY TO STIPULATE—CONSTRUCTION OF CODE.—

Section 283 of the Code of Civil Procedure was not intended either to enlarge or to abridge the authority given to an attorney by the client, but only to prescribe the manner of its exercise; and an authorized stipulation may be enforced, even if not complying with the terms of that section, if it is not forbidden by any other statute or principle of law.

ID.—RIGHTS OF CODEFENDANTS NOT MADE PARTIES—FINDING—REVIEW

UPON APPEAL.—Codefendants in the former suit not made parties to the present action cannot be bound by the judgment therein; and the appellants cannot be heard to complain of any finding made by the court against the existence of any interests of such codefendants in the property involved in this action, no proof of which was given on the trial.

ID.—INEFFECTIVE DEED TO ILLEGAL CORPORATION—GRANTEE NOT IN

ESSE—WANT OF DELIVERY AND ACCEPTANCE.—A deed made by the defendant to the alleged incorporated orphan asylum, prior to the compromise, for the purpose of defeating it, is ineffective and void for want of a grantee *in esse* to take under it; and there can be no delivery of such deed to the illegal corporation or any officer thereof, nor any acceptance thereof, express or implied, and no acceptance can be presumed from the beneficial character of the grant.

ID.—MINOR PARTIES TO COMPROMISE—REPRESENTATION BY GUARDIAN AD

LITEM—RATIFICATION AFTER MAJORITY.—The fact that some of the parties to the compromise were minors cannot invalidate it, where they had no general guardian, and were represented in the compromise by their guardian *ad litem* duly appointed, who assisted in negotiating the compromise, and where his acts were solemnly and expressly ratified by them after becoming of age, in open court and by deeds made in pursuance of the compromise, and by participating in efforts to enforce it.

ID.—COMPLAINT IN INTERVENTION—CROSS-COMPLAINT OF PLAINTIFFS—

CONSTRUCTION OF CODE.—An intervention is treated in section 387 of the Code of Civil Procedure as a complaint, to which either party to the action may answer or demur as if it were an original complaint, and where it is adverse to the plaintiffs, they become defendants to the intervention, and have the right as such to file a cross-complaint thereto under section 442 of the same code.

ID.—CONSIDERATION OF COMPROMISE AS TO APPELLANT—ADEQUACY AND

FAIRNESS—FINDING AS TO PERSONS NOT PARTIES.—Where the consideration for the compromise as to the appellant against whom it was enforced is manifestly adequate, fair, and reasonable, and

the result of the litigation is to leave all of the title to the property involved in the former litigation in such appellant, it cannot be complained upon the appeal that codefendants in the former suit, as to whom the consideration for the compromise is also found to be fair and adequate, are not made parties to the present action, and are not bound by the decree, and do not share in the results of this action.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. Wm. R. Daingerfield, Judge.

The facts are stated in the opinion.

W. W. Foote, for Bridget Mines, Appellant.

J. J. Lermen, for Intervenor, Appellant.

Charles F. Hanlon, for Respondents.

CHIPMAN, C.—Action to specifically enforce an agreement to compromise and settle an action pending in the superior court of the city and county of San Francisco. The pleadings are exceedingly voluminous; the findings are many, covering every conceivable phase of a somewhat complex and anomalous case, and were in favor of plaintiff, as was the decree. The case is here on four separate appeals, to wit, an appeal by defendant, and an appeal by the intervenor from the judgment; and separate appeals by the defendant and intervenor from the order denying a motion for new trial. The transcript of the proceedings is the same *mutatis mutandis*, in all four appeals, and relates in fact to but one case, and is so treated in the briefs and will be so treated in the opinion.

A brief history of the litigation and an outline statement of the facts, with some account of the pleadings, are essential to any adequate comprehension of the points presented for decision. In 1887 Bridget Mines, defendant, opened a house in San Francisco for the care of orphans and called it "Girls' Directory Orphan Asylum"; she had but a few dollars of money. In 1888 Harrietta Lyman, a plaintiff, joined Mines in her enterprise, but had no money; at that time the asylum was on Van Ness avenue. In 1890 they moved the institution to the corner of Buena Vista and Central ave-

nues, where it is now situated. They wore a distinguishing uniform as sisters, common to similar societies under the patronage of the Roman Catholic Church, but the association was never recognized or authorized by that church, or any other religious body, in any way. There was a book of rules introduced in evidence, from the which the following appear in the record: "Rule 14. After religious profession, whatever money or property has been brought in by any sister becomes the property of the community. No sister may own anything of herself, not even the superior, but is only the administrator of the property belonging to the community. . . . Rule 20. . . . These rules must be read once a month in the refectory." How far these rules were observed or bound the sisters does not very clearly appear. Lyman testified that when she came to Mines she was not furnished with a copy of the rules and did not for some time know of their existence; that as others came in later a copy was given them, that she herself had a copy, but never made any promises, either when she was received or afterward; that the rules were occasionally, but not frequently, read. In 1889 Bridget Ferry came in, but brought no money. She is not a party to the present action, but was a party defendant to the first action, hereinafter referred to. In 1890 Joseph Newman conveyed to Mines alone, and to her heirs, the real estate on Buena Vista avenue. Prior to January 26, 1894, Hannah Wall, a plaintiff, came in; she brought with her \$250. She was subsequently expelled, as we shall see, and this amount of money was restored to her. She testified that she promised to be obedient to the rules of the institution, and was given a book of the rules. Prior to January 26, 1894, Annie McCarthy came in; she brought no money into the institution. She married subsequently (when does not appear), and is not a party to the present action. Meantime, the property on Buena Vista avenue was expanding into quite a commodious establishment, judging from the large number of orphans there accommodated. It is not shown whence the money came to build and maintain it, except in a general way it appeared that the asylum received quite a large sum annually from the state, and the rest came from charitable contributions, and apparently some from bequests. This part of the history is somewhat vague. On February 1, 1895, Mines

individually, mortgaged the San Francisco property to the Hibernia Bank for \$6,000, and with this money a lot in San Leandro, Alameda county, was purchased and was conveyed to Mines and Lyman. Subsequently, Mines again mortgaged the San Francisco property to the Hibernia bank for \$8,000, all of which, except about \$1,500, was used in constructing buildings on the Alameda property. These mortgages, Mines testified, were paid off with money received "from the state and from public subscriptions of the charitable people," except a balance still due the bank, which the court found is \$5,000. She testified that in 1898 she received over \$9,000 from the state, and the evidence shows that the state aid must have amounted to over \$70,000. Mines appears to have been the executive head of the institution, and Lyman the bookkeeper, who kept the accounts, collected the state aid, and performed work of that character. What the other sisters did does not appear particularly. In 1895 Elma Schumann (a minor), one of the plaintiffs, came to the asylum, but had no money. She was a plaintiff in the first action. She did not sign the articles of incorporation. Yvonne Griffith, a minor, one of the plaintiffs, came to the asylum in 1893. She testified that she became a sister in 1896; that she had no money and was entirely supported by the home, but made no vows; she promised to "be obedient and work for the poor, but not without compensation." She did not sign the articles of incorporation, but was one of the plaintiffs in the first action. The foregoing named persons are all who seem to have had any connection with the institution as so-called sisters. On January 26, 1894, an attempt was made to incorporate the institution as a benevolent association by Mines, Lyman, Wall, McCarthy, and Ferry. The question raised of corporation or no corporation will be noticed later.

In the early part of 1897 some internal dissensions arose. Mines and Lyman fell out, and Mines, without any cause as I can discover, stripped Schumann, Griffith, and Wall of their religious robes under circumstances of great humiliation to them, excluded them from the asylum and forbade their return. On April 17, 1897, Lyman, Wall, Schumann and Griffith filed a complaint against Mines, Ferry and Mc-

Carthy and the Girls' Directory Orphan Asylum, a corporation, in which the existence of the corporation was alleged, and in which also was set out something of the history and purposes of the association and the grievances of the plaintiffs. Plaintiffs therein prayed that the property be adjudged to belong to the corporation, and that Mines holds the title in trust; that she be restrained from selling or mortgaging the property, and to account for all moneys and property belonging to said corporation and convey the same to it, and for general relief. The answer denied that any of the parties other than Mines, Ferry, and Lyman were members of the society when the property was purchased; denied the alleged trust, denied that a corporation was formed or directors elected; denied that the articles of incorporation were verified; in short, denied all the steps alleged to have been taken to create the corporation, and denied that it has any legal existence. This action was set down for trial, after some strenuous but ineffectual efforts to compromise the suit had been made and had failed. On the day set for the trial Mines informed her attorneys, Messers. Sullivan & Sullivan, that she had changed her mind and would settle; the trial was deferred, and all parties met at the office of Sullivan & Sullivan. The court found that a compromise agreement was entered into and authorized to be carried out, which took the form of a stipulation in the case and an agreement. The stipulation in effect was, that the Girls' Directory Orphan Asylum is not, and never was a corporation, and that plaintiffs and defendants in that suit were not members thereof; that plaintiffs therein have no title or interest in any of the property described in the complaint; that defendants therein, McCarthy and Ferry, have no interest in said property; that defendant therein, Bridget Mines, is the owner in fee in severalty of the property and "holds the same free and clear of all trusts or other use, except her own use"; that Griffith and Schumann are not, and never were, members of the society as existing prior to the alleged corporation; that the title of Mines to the real property described in the complaint be quieted as against all other parties to the action. Dated November 3, 1897, and signed Bridget Mines, Harrietta Lyman, Hannah Wall, Yvonne Griffith, Alma Schumann,

Charles F. Hanlon, attorney for plaintiffs, Sullivan & Sullivan, attorneys for defendants. Contemporaneously with the stipulation an agreement was entered into by Mines on the first part, Lyman, Wall, Griffith, and Schumann on the second part, by which it was agreed that on the next day, November 4, 1897, Mines would pay the second parties \$1,000, and thereupon Lyman, who was a cograntee with Mines therein, would convey to them the Alameda county property, and the other second parties would quitclaim to her their interest therein; that all of second parties would convey by quitclaim all their interest in the San Francisco property; that on payment of the \$1,000 said deeds would be delivered to Hanlon in escrow, to be by him delivered to Mines (first party) provided she within five days apply for a loan on the Alameda property for \$2,500 secured by mortgage on the same, the money when borrowed to be paid to Lyman. Contemporaneously with the delivery aforesaid by Hanlon, Mines was to execute her note to Lyman for \$4,500 secured by mortgage on the San Leandro property; if Mines should fail within one month to borrow the \$2,500, then she was to make a note and mortgage to Lyman for \$7,000 in lieu of the two notes named, and on delivery of said note or notes Hanlon was to deliver the three deeds to Mines and the transaction "shall be conclusively deemed to have settled all controversies and claims between and against them respectively excepting the notes and mortgages herein provided for." It was further agreed that "upon the payment of the said sum of \$1,000 said parties of the second part, and each of them, will discard and thenceforth cease to wear the bonnet, habit, or costume now worn by members of the order of St. Francis now in charge of the Girls' Directory Orphan Asylum of San Francisco." Dated November 3, 1897, and signed Bridget Mines, Harrietta Lyman, Hannah Wall, Yvonne Griffith, Alma Schumann. Hanlon signed an agreement to the escrow. The deeds were executed by the second parties to the contract and placed in Hanlon's hands on November 4th; the second parties, agreeably to Mines' insistence as a condition, did not again return to the asylum, but discarded their robes and sought and obtained employment "in the world," as they termed it, where they now are. Mines made some effort to get the \$1,000 which she thought

was to her credit at the Hibernia Bank, but found that it had been applied on her mortgage debt there. She and her attorneys made some effort also to borrow money to make the payments, but failed. Without notice to plaintiffs she executed a deed of the San Francisco property to the corporation bearing date November 8, 1897, and acknowledged and recorded that day, and on November 10, 1897, she executed and acknowledged a deed of the Alameda property to the corporation, which was recorded in Alameda county November 11th. She testified that the next thing she did was to write a letter directed to Lyman, dated November 22, 1897, in which she asks Lyman to return to the asylum, but says nothing about the other sisters. Hanlon testified that Mines said to him that this letter was not written by her, and that it was not her desire at all. On November 22d Mines wrote a letter to Hanlon, in which she speaks of Hanlon's assistant having called upon her to know if she would send her attorney to Hanlon to see him about the case. She wrote: "About this agreement, it was done without my wishes; in fact, I was forced to do it. You know, Mr. Hanlon, I have done nothing but what you wanted me to do in the beginning. I am willing to have all that were sent away return, and I will pay all expenses. If this is satisfactory you can send for me and we can settle, but if not no other conditions will be accepted." To this letter Hanlon replied November 24, 1897, as follows: "My clients will not now accede to your terms as contained in your letter of the 22d inst., and want you to live up to your contract. I will make one last attempt to avoid litigation, and you may call upon me at 1 o'clock P. M.," etc. It seems that several demands had been made upon Mines by Lyman to live up to her contract, by Cousins, guardian *ad litem* for Schumann and Griffith, commencing November 11th, and on the 16th Hanlon informed Mines that unless she carried out her contract at once an action would be brought against her. Nothing seems to have been done except to renew the demands upon Mines at various times, and finally, December 20th, Cousins called upon her and made tender of all the deeds and documents that had been executed under the agreement; also drafts of the note and mortgage which she had agreed to execute; a copy of a formal demand for perform-

ance on her part, and a tender of performance on the part of the other parties which had been previously formally made to her. These papers and documents were all explained or read to her by Mr. Cousins, but she refused to accept any of them and refused to carry out the contract; declared she would pay no money at all, and wound up the interview by saying: "You can proceed against me and have papers served on me, and a lawyer will turn up to fight the case." At a previous interview with her, November 28, 1897, when witness and Hanlon called upon her, witness testified that Mines said she would not have Griffith back, but she wanted Lyman. In several of these interviews she said she did not sign the agreement of her own will; she spoke of having deeded the property, but "she said nothing about rescinding any agreement; she did not use that word." Hanlon testified that at the interview, November 28, 1897, Mines' attention was called to her letter in which she had stated that the girls might return, and, when asked what she meant, replied that she had been advised to write the letter and that she would not allow any of the girls to come back except Lyman; she also said that Sullivan & Sullivan were no longer her attorneys, and denied having any lawyer. In the course of the conversation she said: "I would not have Griffith back for the whole institution. I would sooner break it up than have Griffith back, and I don't want Schumann or Miss Wall, but I will allow Miss Lyman to come back, and we will run the whole thing ourselves." She said that the children were crying for Miss Lyman; "she was the only one who could write up the books or write up the papers for state aid, but she would not have the others back." All attempts to induce Mines to perform the agreements, entered into by her having failed, this action was brought. The complaint was filed December 31, 1897, and was verified. On October 26, 1898, two days after the trial began, plaintiffs filed a second amended and supplemental complaint. On August 26, 1898, the corporation, by its attorney R. M. Royce, filed a verified complaint in intervention, to which plaintiffs on the same day filed a second amended and supplemental answer and also a cross-complaint to the same, and, among other things, alleged that the corporation was duly incorporated. On November 4, 1898, while the trial

was in progress, plaintiffs filed an amendment to the amended supplemental answer to the intervention, and by this amendment alleged that the Girls' Directory Orphan Asylum never had been and is not a *de facto* corporation, and had never done business as such corporation or performed corporate acts; and also that it is not, and never has been a *de jure* corporation, and set forth the particulars in which its articles of incorporation were lacking to constitute it a *de jure* corporation. In addition to defendant's answer to the complaint, she filed October 31, 1898, during the trial, a cross-complaint for rescission of the agreements entered into by her heretofore noticed, to which plaintiffs answered November 1, 1898.

1. Appellants contend that the court erred in finding that the Girls' Directory Orphan Asylum was not a corporation. The finding that it was not a *de facto* corporation was abundantly supported, and appellants do not seriously dispute this conclusion. The evidence tended to show that there were no meetings of the members or trustees, no election of officers, no by-laws adopted, no certificates of shares or membership issued, no seal adopted or used, no records or minutes kept—in short, no corporate acts of any character performed; the institution was managed after as it had been before the attempt to incorporate. There was, therefore, no corporation *de facto*.

2. Conceding the nonexistence *de facto*, appellants claim a *de jure* corporation; and it is contended that if a *de jure* corporation existed it could not be attacked collaterally and could only be questioned by the state. Before any question arises as to the right to attack a *de jure* corporation collaterally there must be proof by the party claiming corporation that it has a *de jure* existence if the fact is denied. How far the right to exist may be attacked collaterally need not be determined in this case, for the reason that the court found, on what we think was sufficient evidence, that intervenor failed to prove the existence of any such corporation. There was no evidence that the facts set forth in the articles were verified as required by section 290 of the Civil Code, or were verified at all. Appellants claim that the requirement of verification is merely directory and not essentially prerequisite to corporate existence, citing *Mokelumne Hill etc.*

Co. v. Woodbury, 14 Cal. 425¹; *Oroville etc. R. R. Co. v. Plumas Co.*, 37 Cal. 354; *Martin v. Deetz*, 102 Cal. 56²; *Humphreys etc. v. Mooney*, 5 Colo. 282.

Section 296 of the Civil Code requires a certified copy of the articles which are filed in the office of the county clerk, certified by the clerk, to be filed with the secretary of state, and "the secretary of state must issue to the corporation, over the great seal of the state, a certificate that a copy of the articles, containing the required statement of facts, has been filed in his office; and thereupon the persons signing the articles and their associates and successors shall be a body politic and corporate," etc.

The corporation has no *de jure* existence under the code provisions until the secretary of state has issued the certificate referred to in the above-mentioned section. The word "thereupon" in the code section has the effect to make the issuance of a certificate by the secretary of state a necessary prerequisite to corporate life. (*First Baptist Soc. v Rapalee*, 16 Wend. 605.) It was proved that the required certified copy of the articles was filed in the office of the secretary of state on January 29, 1894, and the intervenor offered in evidence a certificate of the secretary of state reciting that the articles of incorporation were filed in his office on the above date (which fact properly appeared elsewhere), and also stating "that a certificate of incorporation thereof was issued on said date." Plaintiffs objected that the fact of the issuance could not be proved in this manner, and the court sustained the objection and excluded the certificate. There was some evidence tending to show that some sort of a paper or document was received at the asylum by Wells-Fargo's, and that it had a seal on it, and was a paper like in size to a sample certificate from the secretary of state shown the witness, but as to what was written or printed on the paper or that a certificate did in fact issue there was no evidence. We think the ruling of the court was clearly right. If the intervenor had produced a certified copy of the records of the office of the secretary of state, it would have been admissible under the sections

¹ 73 Am. Dec. 658.

² 41 Am. St. Rep. 151.

of the code cited by appellants (Code Civ. Proc., secs. 1826, 1918); but clearly his certificate that he issued a certificate was not admissible. (*Doyle v. Mizner*, 42 Mich. 332; *Boyce v. Trustees M. E. Church*, 46 Md. 359.) Nor do we think the presumption "that actual duty has been regularly performed" (Code Civ. Proc., sec. 1963, subd. 15) can dispense with the proof that a certificate was issued, and of its contents. But if it be conceded that there is evidence tending to show that a certificate did issue, there can be no valid certificate where the previous steps made necessary to its issue have not been taken. The secretary of state would have no authority to issue a certificate without a copy of the articles of incorporation should come to him duly certified by the county clerk, nor even then if any of the requirements of the code were omitted which are made prerequisite to the assumption of corporate powers. It was said in *Mokelumne Hill etc. Co. v. Woodbury*, *supra*, in respect of such requirements, that "any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question." But as to requirements which are not made prerequisites, it was there said: "The corporation is responsible only to the government, and in a direct proceeding to forfeit its charter." We have, then, the question whether the verification required by section 594 is a prerequisite or may be omitted altogether as merely directory. The legislature must have meant what it said when it required certain further facts to be set forth in the articles of incorporation, and that such "facts must be verified by the officers conducting the election." Section 292 of the Civil Code provides that the articles of incorporation referred to in section 290 "must be subscribed by five or more persons. . . . and acknowledged by each before some officer," etc. This section refers to all private corporations formed under the provisions of the code, but in the case of benevolent corporations still further authentication is required. The legislature has not only required in this class of corporations an acknowledgment before some officer "by five or more persons" (Civ. Code, sec. 292), but the additional facts above referred to, which must appear in the articles, and "must be verified by the officers conducting

the election"; and this means verification as elsewhere referred to in the codes—i. e., by affidavit of these officers. We think this verification is as essential as the acknowledgment, which latter was held to be a prerequisite in *People v. Golden Gate Lodge*, 128 Cal. 257.

Appellant contends that the verification adds nothing to the truth of a statement, but "simply adds dignity to it and places it upon a higher plane." The requirement of verification in pleadings is not so regarded, but must be complied with to give validity to acts pursuant to such proceedings; and we think the reason for so holding applies in the formation of corporations claiming *de jure* existence. (See *In re Close*, 106 Cal. 574, as to insolvency proceedings; *Estate of Boland*, 55 Cal. 310, and *Richardson v. Butler*, 82 Cal. 174,³ in probate proceedings; and *Ex parte Walpole*, 84 Cal. 584, holding that a petition for *habeas corpus* must be verified.) The notary's certificate is that the persons whose names are subscribed to the instrument are personally known to him, and that they appeared before him and acknowledged that they executed the same. But the law demands something more and something quite different in requiring that the facts thus acknowledged shall be verified by the officers conducting the election. We think this verification a prerequisite to the assumption of corporate powers as a *de jure* corporation.

It is not necessary to decide whether or not the court erred in allowing plaintiffs to prove that one of the subscribers to the instrument did not in fact appear before the notary or acknowledge that she subscribed the articles. Conceding error, it was harmless, since the intervenor failed to prove a corporation in the essential particular above noticed.

3. It is claimed by appellants that the pleadings admit due incorporation, and that it was error to find on the evidence against the admissions of the pleadings. In the first action plaintiffs therein alleged the existence of the corporation and the defendant denied the corporation, and the parties were not the same as in this action. In the present action plaintiffs in their amended and supplemental complaint again alleged the existence of the corporation, and in their answer to the intervention they also alleged the corpora-

³ 16 Am. St. Rep. 101.

tion. But before the intervenor and the defendant had closed their evidence plaintiffs obtained leave of the court to amend their second amended and supplemental answer to the intervention, alleging that the Girls' Directory Orphan Asylum is not, and never has been, a corporation *de facto* or *de jure*. Plaintiffs in this action were not estopped by allegations made in the first action of *Lyman v. Mines*, because the parties were different and the issues were different from those presented in this action. In answering the intervention plaintiffs had the right to interpose inconsistent defenses (*Banta v. Siller*, 121 Cal. 414); and, although this changed the issues between plaintiffs and intervenor, and put plaintiffs in the position of alleging the corporation in their complaint and denying the corporation in the answer to the intervention, the cause proceeded and the evidence went in under the amended pleadings, by direction of the court that plaintiffs' amended answer to the intervention should be deemed denied both by the intervenor and defendant. Plaintiffs should have also amended their complaint in this particular, but as the issue of corporation or no corporation was really immaterial as between plaintiffs and defendant, the failure to amend the complaint could not have injured anyone; and, besides, the answer to the intervention denying the corporation may be regarded under the circumstances as in effect an abandonment of the issue presented by the complaint; the issue did not in fact become material until presented by the intervenor. Whether the amendment should have been allowed was a question addressed to the discretion of the court.

4. It is complained that the court directed Mines to mortgage the entire interest in the Alameda county real estate. This contention is on the theory that the property of the asylum was held in trust because the articles of incorporation, signed by two of the plaintiffs and by the defendant, declared that all the property of the asylum should be held in trust by said corporation for the use and benefit of the society; that Ferry and McCarthy were members of the society as much as were Mines, Lyman, and Wall, and that one rule of the society declared that "no sister may own anything herself, not even the superior, but is only the administrator of the property belonging to the community."

There is nothing in the evidence to show that Ferry and McCarthy had any interest in the Alameda property, and as there is no corporation there is no title or interest in it. The terms of the settlement placed the full legal title of the Alameda property in Mines by the deed of Lyman to her; the society as such was not a party to the action and its interests as such, apart from the corporation, were not drawn in question. We see no error in this action of the court. In this connection may be noticed that the court found that the "compromise and settlement was put in writing, and was duly signed and executed by all the parties to said firstly commenced action and was also signed and executed by all their attorneys of record," and elsewhere it was found that "Ferry and McCarthy agreed to each and all the terms of said compromise and settlement, and all the considerations thereof"; and again it is found that "it is not true that said agreement and stipulation was not executed or authorized by Bridget Ferry and Annie McCarthy, . . . but, on the contrary, finds that said stipulation was signed by Messrs. Sullivan & Sullivan, attorneys in said firstly commenced action for said Mines, Ferry, and McCarthy, and for the Girls' Directory Orphan Asylum, a corporation, and at said times said Sullivan & Sullivan were attorneys of record in said first commenced action for said Mines, Ferry, and McCarthy, . . . and that although not signed by said Ferry and McCarthy said stipulation was, and the contents thereof were, fully known to them, and fully authorized by them, and agreed to by each and both of them." Appellants claim that the evidence is insufficient to support these findings. As found by the court, Ferry and McCarthy did not sign the stipulation, but the evidence supports the findings that their attorneys did sign for them and by their authority and with their consent. Section 283 of the Code of Civil Procedure is cited to show that the attorneys of Ferry and McCarthy had no authority to enter into the stipulation. This section "was not intended to enlarge or abridge the authority of the attorney, but only to prescribe the manner of its exercise" (*Preston v. Hill*, 50 Cal. 53⁴); and the stipulation may be enforced although not entered in the minutes

⁴ 19 Am. Rep. 647.

of the court, if oral, or filed with the clerk, if written (*Smith v. Whittier*, 95 Cal. 279); unless forbidden by some other statute or by some principle of law, and we know of none. Ferry and McCarthy had no interest in any of the property as members of the alleged corporation, for the corporation had no interest in it. What their interest was, as members of the society, we do not know, for none was shown as such members, and no issue was presented in the case as to the rights of the society as an unincorporated body or as to the members of any such society. But aside from these considerations, Ferry and McCarthy were not parties to this action and are not bound by the judgment in it. Appellants cannot be heard to complain because of any finding as to Ferry and McCarthy.

5. It is claimed that the court erred in finding that there was no valid delivery by Mines to the corporation of the deeds of the San Francisco and Alameda county property. The evidence was that Mines executed and acknowledged the deeds some days after entering into the compromise agreement and avowedly to defeat its object; the deeds were taken by R. C. Royce (by whose direction does not appear) from the hands of the notary who took the acknowledgment, and by Royce were delivered to the recorder, and later Ferry got them and they were put in a drawer in the asylum without delivery to anybody, and there remained until called for in this suit. Whether Royce was at the time the attorney of Mines or the corporation does not appear. There was no corporation and no officer of the grantee corporation to whom delivery could be or was made, or who was capable of subsequently manifesting acceptance, express or implied.

Conceding that the intention of the grantor, Mines, was to deliver the deed to the corporation, there could be no valid delivery where there was no grantee *in esse*; and the same may be said in answer to the proposition that acceptance will be presumed on the part of the grantee from the beneficial character of the grant, and also as to the other circumstances suggested by appellants.

6. It is urged that the compromise agreement was void because two of the parties to it, Griffith and Schumann, were minors under the age of eighteen, and the contract affected

real estate in which they had an interest. The evidence showed that these minors were represented by O. F. Weldon as guardian *ad litem*, duly appointed, and they had no general guardian; this guardian assisted in negotiating the compromise, and the agreements were executed with his consent and in his presence and by his express authority; they came of age before the trial closed and by deed and in open court ratified all that had been done; they participated in the subsequent efforts to induce Mines to carry out her contracts.

It was competent for Griffith and Schumann to ratify what had been done in their behalf, and this they did in the most solemn manner by declaration in writing and on the witness stand in the presence of the court at the trial. Whether their guardian *ad litem* had authority to bind them, which appellants deny, is not material in view of the subsequent ratification, after they came of age, of all his acts and of all other acts done in their behalf or which in any way affected them.

7. Error is urged in permitting the plaintiffs to file a cross-complaint to the complaint in intervention. The objection seems to be that by section 442 of the Code of Civil Procedure only a defendant may file a cross-complaint; that section 387 of the Code of Civil Procedure, which provides for intervention, contains no provision for a cross-complaint, and, as by section 442 only a defendant may file a cross-complaint, there is no authority for a cross-complaint to an intervention. Section 387 treats the intervention as a complaint to which either party to the action "may answer or demur . . . as if it were an original complaint." The intervention may be adverse to both plaintiff and defendant. Where it is adverse to either such party becomes defendant, and the intervenor plaintiff in the intervention, and such defendant then has all the rights to plead given to defendants in an ordinary action, and may file a cross-complaint to the intervention under section 442, *supra*.

8. The court found that the consideration moving to Mines, Ferry, and McCarthy for the execution on their part of the compromise and agreement was adequate, fair, and reasonable, under which Mines was to receive, with the knowledge and consent of Ferry and McCarthy, the title and possession of all the assets and lands referred to, and "which

were then and now of the value of \$50,000 and upward." It is true that no provision is made for Ferry and McCarthy in the division of the spoils of this suit, but as they are not parties to it or bound by it appellants cannot complain; and as to Mines, the consideration seems quite adequate. How far Ferry and McCarthy would be bound by the stipulation and agreement should they hereafter attempt to assert any rights or interest in the property we express no opinion; apparently, they have cast their lot with Mines and remain, as heretofore, with her to assist in managing the asylum. Nor do we intend to express an opinion as to the rights of the Girls' Directory Orphan Asylum as an unincorporated society, nor of the members thereof other than those whose rights are now before us; nor as to the rights of the state, or of the charitably disposed persons who have contributed so liberally to the upbuilding of an institution the legal title to which is in Mines. The result of this litigation leaves this valuable property in the absolute control of Mines, with power to do with it as she may will. We should be glad to find some way in this case to declare the charitable use with which the property is morally, if not legally, impressed, but we see no way to do so under the pleadings or the evidence.

Having given attention to all the various questions presented by appellants which seem to call for notice, and finding no prejudicial error in the record, it is recommended that the order be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 645. Department One.—September 17, 1900.]

E. E. HUNTLEY, Appellant, v. SAN FRANCISCO SAVINGS UNION, Respondent.

DEED FROM FATHER AND SON—DEPOSIT WITH NOTARY—DELIVERY—PRECEDENCE OF TRUST DEED.—A deed from a father to his son, signed, acknowledged, and left with the notary under an agreement between the parties that it was not to be recorded, and was to be delivered to the son only in case of the death of the father, is not operative from its date nor prior to its actual delivery to the son; and a deed of trust given by the father for money borrowed, which was executed and recorded prior to the final delivery and record of the deed to the son, takes precedence thereof.

ID.—PERMISSIVE POSSESSION OF SON—VERBAL CONTRACT FOR GIFT—ADVERSE POSSESSION NOT SHOWN.—Where it appeared that the son was permitted to take possession of the land under a verbal understanding with the father that if he could make a living thereon he would give it to him, his possession is not under claim of title adverse to that of the father, in the absence of a showing that he ever asserted or claimed adversely to the father.

ID.—POSSESSION AS NOTICE OF RIGHTS OF SON.—The possession of the son at the time of the execution of the deed of trust could not operate as notice of any other rights of the son than those established at the trial and found by the court upon sufficient evidence, viz., that he took possession by permission of his father, that the father held the legal title to the land, and that the son would not become the owner until delivery of the deed as agreed upon.

ID.—EQUITABLE RIGHT OF SON—INSUFFICIENT PROOF—MERGER IN DEED AND AGREED CONDITIONS.—Where no consideration was paid for the right of entry upon the land by the son, and it does not appear that any improvements were made by him which were not compensated by the rents, issues, and profits, an equitable right was not shown in his favor as against the father; but any possible equitable right which he may have had to enforce a conveyance ceased upon the execution of the deed by the father under the agreement then made, and the rights of the son were thereafter measured by the terms of that transaction and the conditions then agreed upon on which the deed was to be delivered to him.

APPEAL from a judgment of the Superior Court of Stanislaus county and from an order denying a new trial.
William O. Minor, Judge.

The facts are stated in the opinion of the court.

L. J. Maddux, for Appellant.

E. H. Rixford, and P. H. Griffin, for Respondent.

HARRISON, J.—Suit to quiet title. The defendant alleged an interest in a portion of the lands described in the complaint, by virtue of a deed of trust executed by the plaintiff's grantor to secure an indebtedness to it, and disclaimed as to the remainder of the land described in the complaint. Judgment was rendered against the claim of the plaintiff so far as it extends to the lands in which the defendant claimed an interest, and from this judgment and an order denying a new trial he has appealed.

The land in which the defendant claims an interest is part of a tract which belonged to L. L. Huntley, the father of the plaintiff, who in 1876 said to the plaintiff that he could go upon the land, and if he could make a living there he would give it to him. The place was at that time in possession of one Hall, to whom it had been rented by the father of the plaintiff. After Hall's lease had expired, the plaintiff went upon the land, and thereafter cultivated and improved it and lived upon it a portion of the time. Between August, 1885 and September, 1886, he resided in Lassen county, and in November, 1885, his father executed a mortgage thereon to the Humboldt Savings & Loan Society, to secure the payment of three thousand five hundred dollars borrowed by him from that bank. December 13, 1889, the father signed and acknowledged a conveyance of the land to the plaintiff, but the same was not recorded until June, 1891. In the meantime, viz., November 10, 1890, his father borrowed from the defendant eight thousand dollars, and as security for its payment executed a deed of trust upon the lands in which the defendant claims an interest, and with a portion of the money so borrowed paid off the mortgage to the Humboldt Bank.

1. The court finds that the plaintiff was not the owner of any portion of the land until the 8th of June, 1891. This finding is challenged by the plaintiff upon the claim that the

deed from his father was delivered to him at its date, and that he thereupon became the owner of the land. Whether this deed was delivered at its date, or not until the day it was recorded, was a disputed fact before the superior court. The father testified that prior to its date the plaintiff had asked him to make him a deed of the land, so that in case of his (the father's) death he would not lose the land, and that he consented to make the deed upon the condition that it should not be recorded, and that this was agreed to by the plaintiff. He further testified that he signed and acknowledged the deed and left it in the hands of the notary to be delivered to the plaintiff only in case of his death; that it was his understanding and intention, at the time, that the deed was to be delivered only in case of his death; that he so expressed it, and that the notary and the plaintiff heard it and so understood it at the time. The notary was not called as a witness, and, although the plaintiff gave a different version of the transaction, yet, as the court found in accordance with the testimony of the father, it must be accepted as a fact that the deed was not delivered at its date. The only evidence of its subsequent delivery was that of the plaintiff, who testified that he received it from the notary on the day it was recorded. That the deed was not operative to transfer the title from the father until its delivery needs no citation of authority.

2. The claim of the plaintiff that he had acquired title to the land by adverse possession cannot be maintained. His possession thereof was not taken under any claim of title, but was taken with his father's permission, for the purpose of ascertaining whether he could make a living out of it; and there is nothing in the record tending to show that he ever asserted or claimed to hold possession of the land adversely to his father. No claim of this nature was made in the court below, and in his specifications of error and insufficiency of evidence he makes no reference to having acquired a title by adverse possession, but claims that he has been the owner at all times since 1876.

3. The plaintiff further claims that his possession of the land at the time his father executed the deed of trust was notice to the defendant of his claim thereto, and put defendant upon inquiry as to the extent of such claim, and that the

defendant took the deed of trust charged with notice of all the facts that such inquiry would have disclosed. If it be conceded that the possession of the plaintiff was such as to charge the defendant with notice of whatever facts an inquiry would have disclosed, it cannot be assumed that such inquiry would have disclosed any other or different facts than those established at the trial herein, viz., that the possession of the plaintiff was with the permission of his father, and that his father still held the legal title to the land, and that the plaintiff would not become the owner until the delivery to him of the deed from his father. The plaintiff did not show any equitable right to the land as against his father. He had paid no consideration for the right of entry upon the land, or for its possession, and, although he had expended certain moneys and labor in improving the land, he testified that he was all the time in the enjoyment of its rents, issues and profits, and it does not appear that for the money and labor thus expended by him he was not thereby fully recompensed. Moreover, whatever equitable right he may have had to enforce a conveyance from his father ceased when his father made the conveyance of December 13, 1889, and thereafter his rights were to be measured by the terms of that transaction and the condition then agreed upon on which the deed was to be delivered to him.

The judgment and order are affirmed.

Van Dyke, J., and Garoutte, J., concurred.

Hearing in Bank denied.

CXXX. CAL—4

[L. A. No. 596. In Bank.—September 17, 1900.]

GEORGE W. BECK, Appellant, v. PASADENA LAKE
VINEYARD LAND AND WATER COMPANY, Re-
spondent.

WATER COMPANIES—CONVEYANCE TO MEMBERS—PROPORTIONATE SHARE OF EXPENSE—DISINCORPORATION—SYSTEM OF NEW COMPANY—CUSTOMARY RATES—RIGHTS OF OLD MEMBERS.—Where a former water company had conveyed lands and water rights to its members, agreeing to supply the water subject to its rules and regulations, on condition of paying a proportionate share of the expense of maintaining its pipes, flumes, zanges and reservoirs, and after allowing them to become greatly out of repair had disincorporated and a large number of its members had formed a new stock company, which had at great expense rehabilitated and improved the system, and constructed new pipes—one who was only a member of the old company, and who had applied to the new company for delivery of his share of water by connection with a new pipe wholly constructed by it, which was granted on certain conditions, including payment of its customary rates, cannot, after such connection and payment of such rates, insist upon delivery of the water under the former method of proportionate expense, without payment of the customary rates charged by the new company to all consumers of water.

ID.—INJUNCTION SUIT—SEVERANCE OF CONNECTION WITH NEW PIPE—RIGHT TO CONNECT WITH OLD SYSTEM—FINDINGS—JUDGMENT WITHOUT INJURY—APPEAL.—In an action by a member of the former company to enjoin the new company from severing connection with its pipe for nonpayment of its customary rates, where the facts found are such that, whatever may be the plaintiff's right to connect with the pipes and reservoirs of the former company, by paying his proportionate share of costs and expenses, he is not injured by a judgment against his right to receive water by connection with a new pipe constructed by the new company, without payment of its customary rates under a subsequent special contract for such payment, the judgment will be sustained upon appeal.

COST BILL—TIME FOR FILING—DELIVERY OF FINDINGS AND JUDGMENT TO CLERK—NONFILING—NONPAYMENT OF CALENDAR FEE.—A cost bill filed and served within five days after delivery of the decision and judgment to the clerk cannot be stricken out because the clerk failed to indorse any filing upon the decision and judgment until after the filing of the cost bill, upon the alleged ground that the calendar fee had not been paid.

ID.—NONPAYMENT OF FORMER FEE—DUTY OF CLERK AS TO NEW SERVICE.
The clerk cannot, because of the nonpayment of a former fee which

he had neglected to demand in advance, properly refuse to perform a new service which it is his duty to perform. It was the duty of the clerk to file the findings and judgment when they were delivered to him to be filed, without regard to the unpaid calendar fee.

Id.—NEGLECT OF CLERK'S DUTY—RIGHTS OF PARTY NOT FORFEITED.—As a general rule, a party is not to suffer the forfeiture of a right because the clerk has neglected to perform his duty.

APPEAL from a judgment of the Superior Court of Los Angeles County and from orders denying a new trial, and denying a motion to strike out a cost bill. Walter Van Dyke, Judge.

The facts are stated in the opinion of the court.

William H. Fuller, for Appellant.

A. R. Metcalfe, and Anderson & Anderson, for Respondent.

McFARLAND, J.—Plaintiff appeals from a judgment in favor of the defendant, from an order denying his motion for a new trial, and from an order denying his motion to strike out defendant's cost bill. Appellant claims a certain interest in the water of a stream called the Arroyo Seco, and had been taking the water by connection made with a pipe of the respondent and paying respondent certain customary water rates therefor. Shortly before the commencement of this action, appellant had declined to pay these water rates, or any rates, and respondent had refused to furnish him any more water without payment of the rates, and had threatened to sever the connection between appellant's pipe and that of respondent, and thus cut off the water; and thereupon appellant brought this action to have it adjudged that he owned the amount of water claimed by him and that he had the right to take it from respondent's pipe, and he prayed for an injunction restraining respondent from cutting off the water by severing the connection between the pipes. The main question in the case is whether or not appellant has the right to take water from appellant's pipe without paying water rates therefor.

The history of the events out of which the litigation arose runs through a good many years, and presents facts some-

what complicated and difficult to state briefly, but the main features of the case necessary to be noticed are these: From 1875 to 1894 there was in existence a corporation called the Lake Vineyard Land and Water Association. It was disincorporated in 1894. In 1875 it owned a tract of land containing two thousand five hundred acres, situated in and near the city of Pasadena, and also the seven-tenths of all the water of the said Arroyo Seco. Its purpose was to divide this tract of land into small lots and sell the same, and to grant to each purchaser an interest in the water proportionate to the amount of land purchased. It built a ditch about three miles long from a point on the stream called Devil's Gate, and thus carried the water to some reservoirs, and it had some pipes and branch ditches through which the water could be to some extent distributed. In 1883 it conveyed to Annie and Luke Wilson a lot of land containing thirty-three and seven-hundredths acres—part of the two thousand five hundred acre tract; "and also, as appurtenant to the said above-described lot of land, seven and one-half ($7\frac{1}{2}$) five hundredth parts of all the right, title and interest of the said Lake Vineyard and Water Association, as the same was originally conveyed to said association, and prior to any conveyance by said association, in and to the waters of Arroyo Seco, said interest of said association being divided into five hundred parts, and with the right to use the same from the pipes and reservoirs of said association under the rules and regulations to be prescribed by said association, provided and upon the condition that the interest in said waters and the right to use the same herein directed to be conveyed shall be liable for the costs and expenses incurred in tending and keeping in repair the pipes, flumes, zanges and reservoirs through which said waters are conducted, in the proportion that said number of parts herein agreed to be conveyed bears to the whole number of parts in said waters"; and appellant bases his rights asserted in this action upon the clause of the grant to the Wilsons just quoted. In July, 1886, the said Wilsons conveyed the above lands to H. M. Magee; in August 1891, Magee conveyed to L. P. Hansen fifteen and sixteen-hundredths acres of said land; and in April, 1894, Hansen conveyed to plaintiff two and one-twentieth acres of said

land—the proper proportionate share of the water following the above conveyances of land.

The old association having disposed of all of the said two thousand five hundred acre tract and its said water rights to purchasers, and having little further interest in the matter, made no effort to keep the waterworks in repair. The ditch became cracked and leaky, so that a great deal of the water which entered it at Devil's Gate never reached reservoir No. 1; the reservoirs, being merely mud reservoirs, became dirty and filthy; and the purchasers could not get sufficient water, nor any water fit for use. Under these circumstances the respondent, the Pasadena Lake Vineyard Land and Water Company, was incorporated in 1884 by a large majority of the purchasers from the old association for the purpose of utilizing the water rights acquired as aforesaid, and developing and acquiring further water, if necessary, so that they might have sufficient supplies of good water. These persons granted to the new corporation their interest in the water and received therefor shares of the corporate stock. A few of the purchasers from the old association—including appellant's grantors—declined to join the new movement and did not convey their interests in the water to respondent. The respondent laid a steel pipe from Devil's Gate to reservoir No. 1, cemented the reservoirs, laid some new pipe in place of old ones which were of inferior quality, laid pipe lines to places where there had been none before, and developed the water so as to greatly increase the flow. To assist in doing this it levied and collected assessments on the stockholders amounting to seven dollars and fifty cents per share. It also established a water rate which was charged its stockholders for water furnished them, the rate being fixed at an amount which was considered to be about sufficient to keep the works in proper repair and running order.

The acts and conduct of appellant and his grantors with respect to their rights are these: The Wilsons never made any connections of any kind with the distributive system of the old association; Magee never made any connections with works of the old association; but in May, 1897, he, as owner of the proportionate share of water apurtenant to his land, made written application to the corporation respondent to

make connection with a pipe line of respondent, which never belonged to the old association, to take water to his land; the respondent, in writing, granted the application upon the condition that the pipe line to be laid by Magee should become the property of the respondent in one year after it was laid, and that Magee, in using the water, should conform to the rules and regulations prescribed by respondent. Magee laid his pipe and connected it with the pipe of respondent, and commenced taking water and paying to respondent therefor the rate charged to its stockholders, and continued to so take and pay until he conveyed to Hansen; and after that Hansen was substituted on the books of the respondent in place of Magee, and has continued to take and pay for the water as Magee had done, up to the present time. In May, 1894, Hansen made application to respondent to connect with one of its pipe lines which had never belonged to the old association, and the application was granted and the connection made, and Hansen continued to pay the usual rates for water charged by the respondent. After the appellant purchased from Hansen and had built a house upon the tract which he purchased, he had his land connected with respondent's system by a pipe which he connected with the pipe that had been laid by Hansen, and commenced to pay the regular rates which it charged for water. He continued to pay these rates for about two years, and in the month of December, 1895, had paid as such rates the total of forty-nine dollars and thirty-five cents. He afterward refused to pay any more rates, and at the time of the commencement of this action there was due from appellant to respondent, according to respondent's rates, about thirteen dollars and fifty cents; and for the refusal to pay this amount respondent threatened to shut off the water. Respondent is willing to continue to furnish appellant the water which he claims, as it has been accustomed to do, upon the payment by appellant of the usual rates. Under these facts the court below properly refused to enjoin respondent from severing the connection between the pipes of the parties.

The contention of appellant is that, notwithstanding the fact that he and his grantors had for many years, at their own request, received their water through the pipe of respondent and paid the customary rates therefor, yet he has

the right to now return to the method described in the deed from the old association to the Wilsons in 1883, namely, to demand of respondent a statement of "the costs and expenses incurred in tending and keeping in repair the pipes, flumes, zanges and reservoirs through which said waters are conducted," and, having obtained such statement, to have his water carried and delivered to him through respondent's pipe upon payment by him of his proportionate share of such costs and expenses. We waive the point made by respondent that appellant, by the acts above mentioned of his grantors and himself, continued during a period greater than the statutory period within which he could successfully have brought an action to enforce his alleged water right, is estopped from asserting any right in the premises other than the one he has been exercising during that period. Whatever interest in the water appellant still has under the deed to the Wilsons in 1883, that deed does not give him the right to compel respondent to allow him to connect with respondent's present pipe at the point where he demands connection. That pipe is no part of the "pipes and reservoirs" of the old association which, by the deed, appellant's grantors were entitled to use "under the rules and regulations to be prescribed by said association." It is a pipe laid by the respondent for the benefit of itself and its stockholders. It is true that several years afterward, in 1894, the old association was disincorporated and respondent was appointed its trustee for certain purposes. But this pipe in question was constructed long prior to that time and while the association was in existence, and was built by respondent for its own purposes and in order to take water to the lands of its stockholders, and it was no more a part of the works of the old association than would have been a pipe laid by any other person in order to connect with the old works. The court so found; and the contention of appellant that the finding is not sustained by the evidence is not maintainable. Under the old association purchasers were not entitled to have water brought upon their land; their right was simply "to use the same from the pipes and reservoirs of the association under the rules and regulations to be prescribed by said association." The pipe in question laid by respondent is as much

its own property as were the pipes of Magee and Hansen—laid for the same purpose—the property of those persons.

Appellant contends that there is no finding as to his averment that he is the owner of the one twelve hundred and twentieth part of all the title and interest of the old association in the waters of the Arroyo Seco, and of the right to take the same “from the pipes and reservoirs” of said association upon paying his proportionate share of the “costs and expenses incurred” as above stated “under the rules and regulations,” etc. This contention, however, cannot be maintained. The court did find as to this averment. The averment was that appellant owned one twelve hundred and twentieth part of all the waters of the Arroyo Seco; and in finding IV the court found that appellant did not own “the right to take and use the one twelve hundred and twentieth part of all the waters of the Arroyo Seco, but has the right to use that amount of seven-tenths of the waters of the Arroyo Seco under the rules and regulations prescribed and to be prescribed” by respondent as trustee of the old association; and that the deeds to the Wilsons, to Magee and Hansen, and to plaintiff, “did convey to the grantees in said deeds the right to use the waters mentioned in said respective deeds ‘under rules and regulations prescribed and to be prescribed by the Lake Vineyard Land and Water Association.’ ” The same thing is substantially found in findings IX and XV. What the court did find—and this involved the real issue in the case—was that the terms of the Wilson deed did not entitle appellant to receive his water by a connection which had been made with respondent’s pipe under the subsequent special contract; and that to avail himself of that contract he must comply with it on his part by paying the customary rates charged all consumers.

Although this case has been strenuously litigated it does not appear to involve much of pecuniary value. The court found that the rates paid by appellant did not equal in amount his proportionate share of “the costs and expenses” of operating the system; and although appellant contends that the evidence does not support this finding—and we need not determine whether or not it does—still it is apparent that

the difference cannot be of much importance. Appellant appeals for an equitable consideration of the case, and says that the stockholders of respondent at one time received a dividend of one dollar per share, and that he cannot receive any dividend; but it must be remembered that the stockholders paid seven dollars and fifty cents assessment per share, without which a sufficient supply of water fit for use could not have been obtained by any of the purchasers from the old association. Whatever may be appellant's right to connect with the pipes or reservoirs of the old association by paying his appropriate share of costs and expenses, the judgment in the present action is correct.

2. The court did not err in denying appellant's motion to strike out respondent's cost of thirty dollars. The grounds of the motion were that the cost bill was not filed and served within five days after the filing of the decision and judgment, and because it was filed before the filing of the latter. The facts are these: On February 1st, the findings and judgment signed by the judge were handed by respondent's attorney to the clerk for filing; at that time nothing was said by the clerk about a fee for such filing, or about any fee whatever; within five days thereafter respondent filed and served his cost bill; on February 8th appellant's attorney gave notice that on February 14th he would move to retax the costs by striking out of the said cost bill certain enumerated items, and on the 14th the motion was heard and denied—no point having been then made that the cost bill had not been properly filed. Afterward respondent's attorney was informed by the clerk that he had not filed the findings because there remained unpaid an old fee of two dollars "for placing said action on the calendar for trial." The statute provides that the party asking to have a case put on the trial calendar must pay this two dollar fee; but it does not appear at whose request the case at bar was put on the calendar. Moreover, if this old fee had been owing by respondent, and the clerk had voluntarily put the case on the calendar without demanding or receiving it, he was not authorized by any statutory provision to which we have been referred to refuse to perform a subsequent service because the former fee had not been paid. It does not appear that

there is any fee prescribed for filing the findings and judgment, and no point is made on the respondent's failure to pay any such fee. It appears, therefore, from the record that it was the duty of the clerk to file the said papers handed to him to be filed. (This is not like the case where papers are sent to the clerk by mail, and he has no opportunity to demand fees.) Therefore, the rule that a party shall not suffer the forfeiture of a right because the clerk has neglected to perform his duty applies in the case at bar in favor of respondent. An embarrassing case might possibly arise where the neglect of the clerk would necessarily forfeit a right of either one or the other of the parties; but such question does not arise in the case at bar. Our conclusion is, that the court did not err in denying the motion to strike out the cost bill.

The judgment and orders appealed from are affirmed.

Temple, J., Harrison, J., Garoutte, J., and Beatty, C. J., concurred.

[Sac. No. 805. In Bank.—September 17, 1900.]

THERESA A. WILLIAMS, Respondent, v. W. G. LONG et al., Appellants.

APPEAL—LIMITATION OF TIME—JURISDICTION—MANDATORY STATUTE—SUBSEQUENT DISABILITY.—Statutes limiting the time for appeal are jurisdictional and mandatory, and the courts have no power not given by the statute to extend the time limited for an appeal. When the period of limitation has begun to run, no subsequent disability will suspend its operation.

ID.—DISMISSAL OF APPEAL FROM JUDGMENT—DEATH OF RESPONDENT—SERVICE OF NOTICE.—An appeal from the judgment will be dismissed if taken after the lapse of the time limited therefor; and the fact that the respondent died some eighteen days before the expiration of the six months allowed for the appeal, and that not until after its expiration an administratrix was appointed upon whom service of notice of the appeal was made with due diligence, cannot operate to suspend the period of limitation, or to preclude the dismissal of the appeal.

MOTION to dismiss an appeal from a judgment of the Superior Court of Tuolumne County. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

F. W. Street, Percy V. Long, and C. C. Hamilton, for Appellants.

F. P. Otis, for Respondent.

HENSHAW, J.—This is a motion to dismiss defendant's appeal from the judgment, upon the ground that the appeal was taken after the statutory period had elapsed. This fact is not denied, but in resisting the motion it is shown that some eighteen days before the expiration of the six months allowed for appeal the plaintiff, in whose favor the judgment was rendered, had died, and that only after the expiration of the six months was an administratrix of his estate appointed, upon whom service with due diligence was made. Under this showing it is contended that the running of the statute of limitations should be held to have been suspended from the date of the death of plaintiff to the date of the appointment of his personal representative.

Statutes limiting the time of appeal are jurisdictional and mandatory. (*Henry v. Merguire*, 111 Cal. 1.) In the absence of an express authorization in the statute itself a court has no power to extend the time for taking an appeal, or to relieve an appellant from the effect of misfortune, accident, surprise, or mistake. No such authorization is found in the statutes of this state. In this case the statute had begun to run, and had been running against this appellant for more than five months before the death of the plaintiff. It is a well-settled rule and principle of law, except as modified by positive enactment, that when the statute of limitations has begun to run no subsequent disability will suspend its operation. In *Pace v. Ficklin*, 76 Va. 292, the time in which an appeal should have been taken was limited to two years. Judgment was rendered against an assignee in bankruptcy, and during the two years the assignee died and a successor was appointed. In support of the appeal it was urged that the period between the death of the first assignee and the appointment of his successor should be deducted

from the statutory time. But the court said: "In answer to this it is sufficient to say that the statutes defining and limiting the right of appeal make no such exception or restriction, and there is no rule or principle in law which authorizes the courts to do so. . . . In this case Pace was alive at the date of the decree. The limitation then commenced to run, and so continued, notwithstanding his death at a subsequent period."

The motion to dismiss is granted.

McFarland, J., Van Dyke, J., Harrison, J., and Temple J., concurred.

[L. A. No. 874. In Bank.—September 17, 1900.]

ALBERT MEYER, Respondent, v. CITY OF SAN DIEGO
et al., Appellants.

APPEAL—ABSENCE OF UNDERTAKING—DISMISSAL—JOINT NOTICE BY CITY AND WATER COMPANY.—Where a city and a water company jointly gave notice of their appeals, the situation is no different from what it would have been if either had prosecuted its several appeal and served the other with notice thereof, and a motion to dismiss both appeals for want of an undertaking on appeal will be denied as to the city, which is not required to give an undertaking, and will be granted as to the water company, the appeal of which is ineffectual in the absence of an undertaking.

MOTION to dismiss joint appeals from a judgment of the Superior Court of Orange County and from an order refusing to modify the findings and judgment. J. W. Ballard, Judge.

The facts are stated in the opinion of the court.

H. E. Doolittle, for Appellants.

William H. Fuller, for Albert Meyer, Respondent.

L. L. Boone, and Works & Works, for Other Respondents.

HENSHAW, J.—From a judgment rendered against them, and from an order of the court refusing to modify the findings and the judgment in certain particulars, the defendants, the city of San Diego and the Southern California Mountain Water Company, a corporation, jointly gave notice of their appeals. This is a motion to dismiss those appeals upon the ground that they are not supported by any bond or undertaking given upon appeal, as required by section 940 of the Code of Civil Procedure. It is conceded that no undertaking upon appeal was ever filed by the appellants, or by either of them. As for the city of San Diego no undertaking on appeal was requisite. (Code Civ. Proc., sec. 1058.) But the fact that the Southern California Mountain Water Company joined in the appeals of the city of San Diego did not relieve that company from the necessity of filing a proper undertaking. Without such undertaking the appeals of the water company are ineffectual for any purpose and must be dismissed. But it does not follow therefrom that the appeals of the city of San Diego must share a like fate. By joining with the city of San Diego in giving notice of appeal the purposes of the notice were fully accomplished, and the situation is no different from that which would have been presented had the city of San Diego prosecuted its separate appeal and duly served the water company with notice thereof.

The motion to dismiss the appeals of the Southern California Mountain Water Company is therefore granted, while the motion to dismiss the appeals of the city of San Diego is denied.

McFarland, J., Temple, J., Harrison, J., Garoutte, J. and Van Dyke J., concurred.

[Sac. No. 626. Department One.—September 18, 1900.]

GEORGE E. BATES, Appellant, v. H. D. HALSTEAD, Respondent.

SWAMP AND OVERFLOWED LAND—IRREGULAR PLATTING AND LISTING TO STATE—MEANDERING LINE—CHARACTER OF LAND—CONCLUSIVENESS OF DETERMINATION.—An irregular platting and listing of swamp and overflowed land to the state, not conforming to the requirements of the act of Congress, relating to legal subdivisions of land, but bounding the land platted and listed by a meandering line which excluded from its limits the smaller portion of some legal subdivisions and included therein the smaller portion of other legal subdivisions, is nevertheless a conclusive adjudication that all of the lands so platted and listed are swamp and overflowed, and that all of the lands excluded from the plat are not swamp and overflowed, but belong to the United States.

ID.—FEDERAL AND STATE PATENTS—SMALLER PART OF LEGAL SUBDIVISION.—A patent from the United States of the smaller part of a legal subdivision of land excluded from the limits of such meandering line will prevail over a state patent granting the major part of the same legal subdivision as swamp and overflowed lands within the limits of the meandering boundary.

ID.—ACTION TO QUIET TITLE—MISTAKE OF LAND DEPARTMENT NOT INVOLVED.—If it be conceded that the land department made a mistake in the manner in which the land was platted and listed to the state, such mistake cannot be reached in an action by the holder of the United States patent to quiet his title thereunder as against the holder of the state patent. Such action involves only the legal title to the land patented.

APPEAL from a judgment of the Superior Court of Tulare County and from an order denying a new trial. Wheaton A. Gray, Judge.

The facts are stated in the opinion of the court.

Freeman & Bates, and Hannah & Miller, for Appellant.

The decision of the secretary of the interior as to what land should vest in the state as swamp is evidenced by the approved list, and the secretary's decision is binding on this court. (*French v. Fyan*, 93 U. S. 169; *Hannibal etc. R. R. Co. v. Smith*, 9 Wall, 95; *Smelting Co. v. Kemp*, 104 U. S. 636; *Heath v. Wallace*,

138 U. S. 573; *Steel v. Smelting Co.*, 106 U. S. 447; *Johnson v. Towsley*, 13 Wall. 72; *McCormick v. Hayes*, 159 U. S. 332; *Chandler v. Calumet etc. Min. Co.*, 149 U. S. 79.)

Charles G. Lamberson, for Respondent.

By virtue of the law of Congress, all of the land in any legal subdivision the greater part of which was returned on the plat as swamp and overflowed belonged to the state, and will be conveyed by its patent. (Act of Congress 1850, sec. 3.) A party authorized to demand a patent has a vested title. The state had a vested title under the act of Congress. (*Wright v. Roseberry*, 121 U. S. 488; *Railroad Co. v. Smith*, 9 Wall, 95; *Tubbs v. Wilhoit*, 73 Cal. 61; *Kernan v. Griffith*, 27 Cal. 87.) The legal subdivisions contemplated by the act of 1850 are forty-acre tracts. (*Hannibal etc. R. R. Co. v. Smith*, *supra*; *Robinson v. Forrest*, 29 Cal. 318; *Hogaboom v. Ehrhardt*, 58 Cal. 231.) A patent issued in violation of law is not conclusive; but the patentee will hold it as trustee of the party entitled to the land. (*Johnson v. Towsley*, 13 Wall. 72; *Stark v. Starr*, 6 Wall. 402; *Lytle v. Arkansas*, 22 How. 193; *Garland v. Wynn*, 20 How. 6; *Lindsey v. Hawes*, 2 Black, 554.)

GAROUTTE, J.—This action is brought to determine adverse claims to certain real estate, described as lots 1 and 2 in section 32, township 8 south, range 24 east, comprising about thirty-one acres of land. Plaintiff relies upon a patent from the United States issued to his grantor; and defendant relies upon a patent from the state under the swamp and overflowed act of Congress, passed September 28, 1850. No evidence was introduced as to the character of the land in dispute, and the question here presented resolves itself into the proposition, as to whether or not these lands were ever platted and listed to the state as swamp and overflowed land under the aforesaid act of Congress.

The greater portion of the said section 32 was platted and listed to the state as swamp and overflowed land, and under the authority of *McCormick v. Hayes*, 159 U. S. 347, it must be held that if this land was not selected and listed to the state when the other portions of the section were selected and

listed, then it is government land, for such selection and listing is a determination to that effect. It is there said: "In the case now before us the selection by Lynn county, grantee of the state, prior to 1875, of swamp and overflowed lands in the very section of which the lands in dispute formed a part, without including the latter in such selection, together with the acquiescence in that selection by the interior department, and the selection by or under the direction of the secretary of the interior, and their certification to the state, first in 1858 and again in 1881, of the lands in dispute, as lands inuring under the act of Congress of May 25, 1856, to the Cedar Rapids and Missouri River Railroad Company, and, therefore, not lands embraced by the act of 1850, constituted a determination based on 'observation and determination' that the lands here in dispute were not swamp and overflowed."

Were these lands selected, platted, and listed as swamp and overflowed lands? Section 3 of the act of Congress of 1850, referring to the duty of the secretary of the interior, is as follows: "And be it further enacted that in making out a list and plats of the lands aforesaid all legal subdivisions the greater part of which is wet and unfit for cultivation shall be included in said lists and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom." It seems this section clearly contemplates that these lists and plats should comprise legal subdivisions of land only, but in the case at bar the plat comprises a large tract of land divided into legal subdivisions to a great extent, yet bounded upon some of its sides by an exterior meandering line. And it appears from the plat that various forty-acre subdivisions are divided by this meandering line, a majority in acreage of many of these subdivisions being without the meandering line, and a majority in acreage of many of them being within the limits of the line. Our attention has been called to no authority justifying this manner of making a plat, and we find nothing in the act even suggesting a meandering line which shall form the exterior boundary line of the land designated upon the plat as swamp and overflowed lands. Upon the contrary, the section of the act quoted clearly contemplates a different course of action upon the part of the government officials. In this case these frac-

tional lots 1 and 2 are outside of this meandering line and comprise about twelve and eighteen acres, respectively, in two different forty acre legal subdivisions of said section 32. This being their status, it is contended upon the part of respondent that, as matter of law, they are swamp and overflowed lands by reason of the provision of section 3 of the act of Congress already quoted.

We cannot bring ourselves to agree with the foregoing contention of respondent, for, upon the very face of the plat itself, the entire large tract of land within the meandering line appears, both by the color of the plat and the indorsements made thereon, to be swamp and overflowed lands. And, beyond this, the list of swamp and overflowed land in said section based upon said plat and returned to the state does not include the land here in controversy. Even if there be some doubt as to the intention of the government arising from the construction to be given the plat by reason of this meandering line dividing forty acre tracts, still there is no doubt but that the land in controversy was not listed to the state when the other portions of the same section were listed. This fact also indicates that the government officers placed a different construction upon the meaning of the plat from that which respondent here seeks to maintain. (See *Niles v. Cedar Point Club*, 175 U. S. 300.)

If the construction of respondent as to the meaning of this plat be a sound one, then all those portions of forty acre tracts situated within the meandering line, not amounting to twenty acres, are not swamp and overflowed lands, and do not belong to the state. Yet the plat, as we have shown, indicates explicitly in two distinct ways that all the land within the meandering line, is swamp and overflowed land, and presumably all of that land has been listed to the state as such. For these reasons it would seem that the status of all these fractional pieces of land within the meandering lines must be deemed forever settled by the acts and adjudications of the land tribunal. Yet there can be no question but that the land here involved stands in exactly the same relation to the law as those fractional pieces within the meandering line. If the line fixes the character of the land within its limits it

equally fixes the character of the land without its limits, that is, as to any forty-acre legal subdivision intersected by it.

It is here a question of legal title alone between these two claimants, and even for present purposes, if it be conceded that the land department made a mistake in the manner in which the plat introduced in evidence was made, yet that mistake cannot be reached in this action.

For the foregoing reasons the judgment and order are reversed and the cause remanded.

Van Dyke, J., and Harrison, J., concurred.

[S. F. No. 1686. Department One.—September 18, 1900.]

YONETARO FKUMOTO, Appellant, v. G. T. MARSH,
Respondent.

ARREST OF DEBTOR—INSUFFICIENT AFFIDAVIT—JURISDICTION—VOID ORDER AND WARRANT—CASE AFFIRMED.—The jurisdiction of the court to order the arrest of a debtor, and to issue a warrant therefor, depends upon the legal sufficiency of the affidavit for the arrest, and not upon the opinion of the judge as to its legal sufficiency. If it is radically insufficient under the statute, in not complying with its provisions, the court cannot assume jurisdiction; but in such case the order of arrest is void, and the warrant is no authority for the arrest or detention of the defendant. *Ex parte Fkumoto*, 120 Cal. 316, affirmed.

ID.—FALSE IMPRISONMENT.—An action for false imprisonment will lie against a defendant who in a civil action caused the arrest of the plaintiff as his alleged debtor, upon an affidavit so radically defective as not to bring the case within the provisions of the statute providing for the arrest.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion.

Wheaton & Kalloch, for Appellant.

An order of arrest not based upon a sufficient affidavit, is without jurisdiction and void; and an arrest thereunder is illegal. (Code Civ. Proc., secs. 479, 481; Const., art. I, sec. 15; *McGilvery v. Moorehead*, 2 Cal. 609; *In re Vinich*, 86 Cal. 71; *Ex parte Fkumoto*, 120 Cal. 316-21; *Meddaugh v. Williams*, 48 Mich. 172.) Where the order of arrest is without legal authority, the person obtaining it is liable as a trespasser for false imprisonment. (7 Am. & Eng. Ency. of Law, 1st ed., 679, 682; *Spice v. Steinruck*, 14 Ohio St. 213; *Hauss v. Kohlar*, 25 Kan. 640; *Gorton v. Frizzell*, 20 Ill. 292; *Von Kettler v. Johnson*, 57 Ill. 109; *Johnson v. Von Kettler*, 66 Ill. 63; *Proctor v. Prout*, 17 Mich. 473; *Cody v. Adams*, 7 Gray, 59; *Hall v. Rogers*, 2 Blackf. 429; *Taylor v. Moffatt*, 2 Blackf. 305; *Painter v. Ives*, 4 Neb. 122; *Sheridan v. Briggs*, 53 Mich. 569.)

Mullany, Grant & Cushing, and O. K. Cushing, for Respondent.

The court was authorized to determine whether a case existed for the arrest, and his determination was a protection to the officers of the court, and to the plaintiff. (Code Civ. Proc., sec. 481; *Fischer v. Langbein*, 103 N. Y. 84; *Dusy v. Helm*, 59 Cal. 188, 189; *Gillett v. Thiebold*, 9 Kan. 427, 432; *Johnson v. Morton*, 94 Mich. 1; *Landt v. Hilts*, 19 Barb. 283, 291; *Johnson v. Maxon*, 23 Mich. 129; *Holliday v. Holliday*, 123 Cal. 26, 32; *Marks v. Townsend*, 97 N. Y. 590, 597; *Lange v. Benedict*, 73 N. Y. 12¹; *Skinnion v. Kelley*, 18 N. Y. 355; *Miller v. Adams*, 52 N. Y. 409.)

CHIPMAN, C.—Action for false imprisonment. Defendant demurred to the complaint for insufficiency of facts, and his demurrer was sustained without leave to amend. Plaintiff appeals from the judgment. The case turns upon the sufficiency of the affidavit in the original action of *Marsh v. Fkumoto*, to confer jurisdiction to make the order of arrest. The arrest was caused under subdivisions 1 and 5 of section 479 of the Code of Civil Procedure. The section reads as follows: "The defendant may be arrested, as hereinafter prescribed, in the following cases: 1. In an action

¹ 29 Am. Rep. 80.

for the recovery of money when the defendant is about to depart from the state with intent to defraud his creditors; 5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors."

Section 481 provides as follows: "The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other persons, that a sufficient cause of action exists, and that the case is one of those mentioned in section 479. The affidavit must be either positive or upon information and belief, and when upon information and belief it must state the facts upon which the information and belief are founded."

The affidavit in question was before this court in *Ex parte Fkumoto*, 120 Cal. 316, and was, in the opinion then rendered, thoroughly analyzed and its defects specifically pointed out. Whether in the affidavit it was made to appear that a cause of action existed against Fkumoto without reference to the complaint in the action then pending, and whether the affidavit could be aided by such reference, were questions not decided and need not now be decided. At the hearing on *habeas corpus* the court determined that there was a material lack in the affidavit in respect of the jurisdictional facts required to bring the case within the statute, and we see no reason now for coming to any different conclusion. Reference to the opinion in that case will relieve us from again presenting the numerous fatal defects of the affidavit. Suffice it to say that the court determined that the facts stated in the affidavit "do not bring the case within either of the provisions of the statute relied on by respondent"; that there is no express averment in the affidavit, nor are facts stated from which a deduction may be made, that "defendant is about to depart from the state with intent to defraud his creditors." The court said: "Both the present purpose and the specific intent found in the language of the statute are wanting in the affidavit"; and it was added: "When the language of such a statute is departed from, the party must at his peril employ words of equivalent import; and a failure in this respect is fatal." It was further said that the affidavit "is equally wanting in facts to show that defendant had removed or disposed of his property, or was about to do so, with intent to defraud his creditors." Again:

"There is another fatal defect common to the entire affidavit. Several of the statements of fact are made expressly on information and belief, whereas the facts upon which such information and belief are founded are in no instance given. In this," said the court, "the affidavit fails to comply with one of the express and most material requirements of the statute." And finally the court said: "As the jurisdiction to issue the warrant rests upon the affidavit, it results from what has been said that the order of arrest was void, and the warrant is no authority for petitioner's detention." Respondent seems to be of the impression that jurisdiction is aided by the pendency of the action. It is necessary to the jurisdiction that an action be pending (Code Civ. Proc., secs. 480, 483); but, as above stated, jurisdiction to make the order rests upon the affidavit.

The learned judge who heard the demurrer expressly placed his ruling upon the authority of *Dusy v. Helm*, 59 Cal. 188. We think the opinion in that case has been misunderstood. It was there said: "If the judge to whom the application was made had jurisdiction to pass upon the sufficiency of the evidence disclosed by the affidavit to procure the order of arrest, the party applying for it cannot be held responsible unless there was an entire lack of evidence of some essential fact which the law requires to be shown."

That was an action to recover possession of certain personal property, and the affidavit was based upon subdivision 3 of section 479, *supra*; the statement in the affidavit was: "That the defendant in said action did, on or about October 19, 1874, fraudulently conceal and remove all said property, to prevent its being found or taken by the sheriff," etc. There was a positive averment of the facts which the statute made a ground for the arrest, and hence it was true, as stated in the opinion, that there was not entire lack of evidence of some essential fact required to be stated. In the case now here, this court has already determined that the affidavit failed in many particulars to comply with the express and most material requirements of the statute, and especially in its allegations of material facts upon information and belief without stating the facts upon which such information and belief were founded. But the statute expressly requires that when the affidavit is upon information and belief "it must

state the facts upon which the information and belief are founded." We cannot agree with respondent that it is but error to be corrected on appeal where facts are stated as was done in the affidavit before us. We think an affidavit resting wholly, or in any one essential particular, on information and belief, without stating the facts upon which such belief is founded, does not confer jurisdiction to issue the order. The statute must be complied with or there is no jurisdiction to issue the order. (*In re Vinich*, 86 Cal. 70; 7 Am. and Eng. Ency. of Law, 1st ed., 682, and cases cited.) It was said in *Spice v. Steinruck*, 14 Ohio St. 213: "It is clear, we think, that in the exercise of this special and extraordinary power conferred by the statute and interfering with the personal liberty of the defendant, the course prescribed by the statute must be strictly pursued." It was further said in *Dusy v. Helm*, *supra*: "The judge having determined, in the exercise of the jurisdiction committed to him by the law, that the affidavit by its statements of facts was sufficient to entitle the party applying for the order, to hold that such party is liable for damages for the erroneous judgment of the judge, would impose on him a responsibility not warranted by law." Respondent quotes this paragraph and apparently claims that where the judge assumes jurisdiction, or has determined to exercise it, there can be no liability, for the reason that his judgment is but erroneous. But the court cannot confer jurisdiction by merely assuming it; nor can its determination that it has jurisdiction confer it. Where the judge has in fact no jurisdiction to act, his order of arrest is void; and whether he has jurisdiction must be determined from the affidavit itself and not from what the judge thinks it authorizes him to do. The plaintiff must see to it that he is clothed with actual, not merely apparent, authority before he can deprive the defendant of his liberty. When the court in *Dusy v. Helm*, *supra*, said that there would be no liability—"the judge having determined in the exercise of the jurisdiction committed to him by the law"—the statement presupposed jurisdiction to exist; and the court did not say nor intend to say that the judge would have jurisdiction because he determined that he had it. What the court in effect said was, that as the judge had

jurisdiction in that particular case, as it clearly had, in its exercise his determination as to the sufficiency of the facts to justify him in making the order was mere error. But it was not said, and we do not think it has ever been said, that where jurisdiction is lacking the issuance of the order would be but error. The distinction is apparent in all the cases cited by respondent, and we think is clearly admitted in *Gillett v. Thiebold*, 9 Kan. 427, relied on by respondent as "singularly similar to the case at bar," and in which Mr. Justice Brewer delivered the opinion. It was there said: "Where the statute prescribes certain conditions for the exercise of powers by an inferior tribunal, a disregard of those conditions renders the attempted exercise of those powers void." In the case we have here this court has already decided that the statutory conditions, upon which the power to act depended, were disregarded, and hence the order was void.

We do not feel called upon to further notice the very able discussion of the question found in respondent's brief. We are clearly of the opinion that the court had no jurisdiction to issue the order, and that it was so decided in *Ex parte Fkumoto, supra*. Such being the fact, the numerous cases relied on by respondent have no application.

The judgment should be reversed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed. Van Dyke, J., Garoutte, J., Harrison, J.

A petition for a hearing in Bank was filed and denied, and from the order of denial Beatty, C. J., dissented, and filed the following opinion on the 17th of October, 1900:

BEATTY, C. J.—I dissent from the order denying a rehearing in this case. The decision in *Ex parte Fkumoto*, 120 Cal. 316, having been made by the court in Bank, is authority which the commissioner and the Department were no doubt bound to follow; but it does not establish the law of this case, and if erroneous should be set aside. I think the court in that case erroneously decided that the affidavit of this defendant failed to state facts sufficient to give the court

jurisdiction to make the order. In my opinion the affidavit contains everything necessary not only to give the court jurisdiction, but to fully justify the order of arrest. I think the judgment in this case should, therefore, have been affirmed.

[Crim. No. 639. Department One.—September 18, 1900.]

THE PEOPLE, Respondent, v. JOHN BREEN, Appellant.

CRIMINAL LAW—SETTING ASIDE INDICTMENT—FAILURE TO RESUBMIT CHARGE—SECOND INDICTMENT.—An order setting aside an indictment or information is no bar to a future prosecution for the same offense; and upon the setting aside of an indictment the failure of the court to order the charge to be resubmitted to another grand jury for examination, as directed by section 997 of the Penal Code, cannot preclude a re-examination thereof by the grand jury, nor affect the validity of a second indictment, which cannot be set aside because of such failure of the court.

ID.—NAME OF WITNESS UPON INDICTMENT—IDENTITY OF MARRIED WOMAN—CHRISTIAN NAME—HUSBAND'S INITIAL.—Where the name of "Mrs. E. Osborn" was indorsed upon the indictment, and "Mrs. Susie Osborn" was a witness at the trial, an order refusing to set aside the indictment for failure to indorse the name of the witness thereon is properly refused, where the identity of the witness appears, and the name indorsed upon the indictment merely bore the initial of her husband, who was also a witness before the grand jury.

ID.—CHARGE OF ARSON—GRAND JURORS' KNOWLEDGE OF BURNING.—Upon the trial of a charge of arson, the fact that some of the grand jurors had personal knowledge that the building was burned does not disqualify them from ascertaining whether the building was feloniously destroyed and who was the guilty party, and is not ground for setting aside the indictment.

ID.—REFUSAL OF FURTHER CONTINUANCE—FAILURE TO SHOW DILIGENCE—DISCRETION.—Where it appears that more than one continuance had been granted to enable the defendant to prepare for trial, the refusal of another continuance is in the discretion of the court; and although the evidence of the absent witnesses as shown by the affidavit of the defendant is material, yet where such affidavit fails to show diligence to secure their attendance or their affidavits that they would testify to the facts stated, or to show that there was a reason-

able probability of procuring their attendance within any reasonable time, it cannot be said that the court abused its discretion.

ID.—EVIDENCE—CROSS-EXAMINATION—INTEREST OF WITNESS—EMPLOYMENT OF DETECTIVE—AMOUNT OF COMPENSATION—HARMLESS RULING.—Upon the trial of a charge of arson, where the president of a warehouse company, the building of which was burned, was a witness for the prosecution, and upon cross-examination, for the avowed purpose of showing his interest and the interest of the company in the prosecution, had testified that he was a stockholder therein, and that the company had employed a detective to ascertain the origin of the fire, and disallowing of a further question as to how much was paid to the detective for his services cannot be deemed prejudicial, in the absence of any claim or showing that the witness had any particular feeling or prejudice against the defendant in the matter of such employment.

ID.—ARGUMENT UPON APPEAL—ASSIGNMENTS OF ERROR NOT ARGUED.—Numerous assignments of error appearing in the transcript on appeal, which are mere naked statements that the court erred in making certain rulings, without any argument made or reasons given why such rulings are erroneous, will not be inquired into by this court upon appeal in order to find out reasons for or against the correctness of the rulings, if they are not apparently objectionable upon their face.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion.

Ansel Smith, and Gus. G. Grant, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

CHIPMAN, C.—Defendant was convicted of the crime of arson, under an indictment presented by the grand jury of San Joaquin county, and was sentenced to ten years' imprisonment at San Quentin. He appeals from the judgment and from the order denying his motion for new trial. There are no errors calling for any statement of the evidence as to defendant's guilt or innocence.

1. Defendant's principal reliance for reversal is that the court erred in denying his motion to set aside the indictment on the ground that the defendant had once before been in-

dicted by a former grand jury for the offense now charged, and upon the setting aside of that indictment of the court it made no order resubmitting the charge to another grand jury for examination, as directed by section 997 of the Penal Code.

Section 995 directs the court to set aside the indictment in certain enumerated cases. Section 997 provides, among other things: "If the motion is granted, the court must order that the defendant, if in custody, be discharged therefrom; or, if admitted to bail, that his bail be exonerated; or, if he has deposited money instead of bail, that the same be refunded to him, unless it directs that the case be resubmitted to the same or another grand jury, or that an information be filed by the district attorney; provided, that after such order of resubmission the defendant may be examined before a magistrate, and discharged or committed by him, as in other cases, if, before indictment or information filed, he has not been examined and committed by a magistrate." Section 999 provides: "An order to set aside an indictment or information, as provided in this chapter, is no bar to a future prosecution for the same offense." These are the sections bearing upon the question.

The statute does not make it the duty of the court to resubmit the charge to another grand jury in every case where the court on motion sets aside the indictment first found; it provides that unless the case is resubmitted the bail shall be exonerated, or if money is deposited in lieu of bail such money shall be refunded; and it also provides that, after such submission, should it be ordered, the defendant may be examined before a magistrate as in other cases, if, before indictment or information filed, he has not already been examined and committed by a magistrate. There is nothing in the statute that would forbid a re-examination where the court had failed to order it, or that can be construed to mean that a resubmission is essential to the validity of a second indictment or information. That an order setting aside an indictment or information is no bar to a future prosecution is plainly declared in section 999.

In *People v. Campbell*, 59 Cal. 243,¹ the defendant was prosecuted by information for the crime of murder, and was

¹ 43 Am. Rep. 257.

convicted of manslaughter. Defendant was committed in August, 1879, and before the new constitution went into effect an indictment was presented against him, which was dismissed by the court, on motion of the district attorney; afterward, in August, 1880, the information was filed on which defendant was convicted. A motion was made to set the information aside, on the ground that the defendant had previously been indicted for the same offense, and it was also claimed, on the trial, that the dismissal of the indictment operated as an acquittal, and a plea of former acquittal was interposed. The court here held that the dismissal of the indictment was no bar to another indictment for the same offense, and that defendant was never in jeopardy under the indictment. Defendant claims that this case involved the construction of sections 1385 and 1387 of the Penal Code, and has no bearing upon the sections above referred to, and that the point he now raises has never been decided by the court. It is true that section 1387 refers to dismissals on the order of the court for want of prosecution or otherwise, while section 999 refers to orders made on motion of the accused to set aside the indictment or information. But the intention of the legislature is quite clear that in either case the order shall not constitute a bar to any future prosecution upon an indictment or information for the same offense. (See *Patterson v. Conlan*, 123 Cal. 453.)

2. The motion to set aside the indictment was based on the further ground that one Mrs. Susie Osborn was a witness at the trial, while the name of Mrs. E. Osborn was indorsed on the indictment. Section 943 of the Penal Code provides that: "When an indictment is found, the names of the witnesses examined before the grand jury . . . must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court"; and by section 995 this omission is made ground for the motion. The direction must be complied with or it furnishes good ground for setting the indictment aside, and it would be error to deny the motion. (*Ex parte Schmidt*, 71 Cal. 212.) The purpose of the law is to inform both the people and defendant of the names of the witnesses upon whose testimony the indictment is based (*People v. Northey*, 77 Cal. 629; *People v. Quinn*, 127 Cal. 542); and in the latter case the name of the witness G. W.

Ogden was held sufficiently indorsed as — Ogden, where the defendant immediately after the indictment knew who was meant by the name as indorsed. In *People v. Crowey*, 56 Cal. 36, the real name of the witness was Gottlieb Diefenbach, and was indorsed on the indictment F. Diefenbach. It appeared that he gave his name to the grand jury as F. Diefenbach, and it also appeared "that there was probably but one person of the name of Diefenbach in the county of Napa [when the indictment was found], or even in the state." It was held that the lower court did not err in denying the motion. One of the grand jurymen testified that he "saw one Mrs. Susie Osborn in the grand jury room. She was sworn as a witness and gave testimony." One E. Osborn was a witness; he was the husband of the woman who also testified and whose name in the record is Mrs. E. Osborn. In the course of Osborn's testimony relating to a conversation between him and defendant, he testified: "He [Breen] said, 'For God's sake, don't let Gould talk to Susie'—that is my wife, I mean." A letter signed "Susie Osborn" was admitted in evidence, which shows that the writer was the wife of this same E. Osborn. We think it sufficiently appears that Mrs. E. Osborn and Mrs. Susie Osborn were one and the same person.

3. The further ground for the motion is not tenable, to wit, that some of the grand jurors had personal knowledge of the fact that the building was burned. Of course, this, being the *corpus delicti*, was a material fact, but knowledge of the fact did not disqualify any one or more of the jurymen from ascertaining whether the building was feloniously destroyed and who was probably the guilty party.

4. It is next contended that the court erred in not granting defendant's motion for a continuance. It appeared that on October 16th the district attorney stated in open court and in defendant's presence that he desired to try the case on October 23d, whereupon defendant requested a continuance of two weeks, in which to prepare for trial, and the case was thereupon set for October 30th. When the case was called for trial on October 30th the defendant stated that he was not ready, and desired further time to procure certain witnesses, and filed a motion to that effect, supported by an affidavit. Section 1052

of the Penal Code provides that: "When an action is called for trial, . . . the court may, upon sufficient cause, direct the trial to be postponed to another day." While it is the policy of the law to extend to defendant every reasonable opportunity to have his witnesses personally present at the trial, if they can be obtained without unreasonable delay (*People v. Dodge*, 28 Cal. 445), the granting or refusing the motion rests very much in the discretion of the trial court; and it is only in cases where that discretion has been abused that this court will review the action of the trial court. (*People v. Gaunt*, 23 Cal. 156.) In the present case the affidavit of defendant showed that one Charles Cornall and his wife, Gertie, and the mother of Gertie were at defendant's house from about half-past nine in the evening until about half-past eleven o'clock of the night when the building burned, and about thirteen blocks from where the burned building was situated. There was evidence that the fire was observed between 12 and 1 o'clock at night; a witness for the prosecution testified: "I heard the clock strike one a good while after I saw the fire." Another witness saw the building "about ten minutes to twelve" and observed no fire at that time, but observed it about a "quarter after twelve." Affiant stated in his affidavit that he first saw the fire that night at about twenty minutes past twelve o'clock, and was then more than seven blocks distant from it, at his own home. The evidence of the witnesses named was material, and defendant was entitled to their testimony. But the affidavit fails to show that any subpoena was issued for the mother of Mrs. Cornall, or that any effort was made to secure her attendance or account for her nonappearance; the affidavit shows no effort to procure the attendance of Mrs. Cornall, except to issue a foreign subpoena, which was returned by the sheriff of the city and county of San Francisco—"could not be found there"; but the affidavit fails to show that any effort was made to learn her whereabouts, except, as stated, that "counsel had made due and diligent inquiry to learn the whereabouts of said witnesses," but does not mention the names of the witnesses to whom affiant referred; assuming that he referred to the Cornalls, the affidavit does not set forth the character of the diligence used. The affidavit is mainly directed to an explanation of defendant's inability to

procure the attendance of Charles Cornall. On the foreign subpoena, as part of the return of the sheriff appeared the following: "Last heard of him by parties referred to in Spreckels Building, that he went to the state of Washington five months ago." A witness testified that "he last saw him on the steamer 'Corcoran' a month ago, or a little longer; that said Cornall stated at that time that he was on the 'Corcoran' as a fireman." Where this was does not appear. There was no evidence that any effort had been made to obtain the affidavit of Cornall, or any other of the persons named; that he or they would testify to the facts stated, nor is any reason given for not doing so. (*People v. De Lacey*, 28 Cal. 589; *People v. Jocelyn*, 29 Cal. 562.) There is no showing from which the court could say that there was a reasonable probability of procuring the attendance of these witnesses within any reasonable time. (*People v. Lewis*, 64 Cal. 401.) The defendant was before the court on the first indictment in April, 1898, and on the second indictment in September, 1899, and the trial began on October 30, 1899, after several continuances. We cannot say that the court abused its discretion.

5. A witness for the prosecution, president of the warehouse company that owned the burned building, testified on cross-examination that he had a small interest in the company as stockholder, and that the company had employed one Gould as a private detective to ascertain the origin of the fire. Defendant's counsel asked the witness how much Gould had been paid for his services. The question was objected to as immaterial, and the objection was sustained, defendant excepting. The ruling is now urged as error. The avowed object was solely to show the company's interest in the prosecution, or the interest of the witness as a stockholder therein. In *People v. Gillis*, 97 Cal. 542, this question of the interest of the witness was somewhat fully discussed, and it was held error to sustain an objection to the question put to the prosecuting witness in a criminal case—"Have you employed Mr. Copeland in this case?" Mr. Copeland was associate counsel with the district attorney. There, and in the cases cited in the opinion, the ruling of the court kept out of the case the fact showing the witness' interest altogether. But here the

witness had testified to the fact that the company had employed the detective named, and it was the employment and not the amount paid for the service that was the material fact going to show interest or prejudice.

In *People v. Goldenson*, 76 Cal. 328, the defendant was convicted of the crime of murder. Mrs. Kelly, mother of the deceased testified in her cross-examination: "I heard the Goldensons were of such a character that I did not want my daughter to go to their house." Defendant's counsel then inquired: "What was the character that you speak about?" An objection to the question was sustained, on the ground that it was immaterial. The court said: "We see no prejudicial error in this ruling. The testimony of the witness showed that she was prejudiced against the Goldensons; the particular reason therefor is immaterial." In the present case, the counsel had developed the fact from the witness that his company had employed a detective, and it was this employment alone which was the ground for the prejudice or bias of the witness, if he had any, and not the collateral fact that the company paid the detective fifty or one hundred dollars, or any other sum per month, while in its service. A case might arise where not only the fact of the witness' prejudice might be shown, by showing that he had manifested an interest by the expenditure of money, but where also the degree of his interest might be inquired into in order to measure the depth and violence of his prejudice; the jury is entitled to know, not only that prejudice exists, but the full extent of that prejudice, and a wide cross-examination is allowable for that purpose. In the present instance, however, there was no claim made that the witness had any particular feeling in the matter against the accused, or any prejudice at all, except as it might be inferred from the fact that the company of which he was president had employed a detective. There was no prejudicial error in not permitting the defendant to show just what the company paid the detective for his services.

6. There are some seventeen other assignments of errors, as to which the remarks of the court in *People v. Woon Tuck Wo*, 120 Cal. 294, 297, 298, are directly pertinent: "There are mere naked statements that the court erred in making

certain enumerated rulings, without any argument made or reasons given why said rulings are erroneous. Under these circumstances we do not feel called upon to prosecute an independent inquiry in order to find out reasons for or against the correctness of the rulings. (See *People v. Gibson*, 106 Cal. 475.) Upon the face of the objections we see no error."

The judgment and order should be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Van Dyke, J., Garoutte, J., Harrison, J.

[S. F. No. 2112. Department Two.—September 18, 1900.]

S. T. MOORE, Respondent, v. THOMAS F. MORRISON,
County Auditor of Santa Clara County, Appellant.

APPEAL—DISMISSAL—SATISFACTION OF JUDGMENT—MOOT CASE.—An appeal will be dismissed where it appears that the judgment appealed from has been satisfied, and that the questions presented have become merely a moot case.

ID.—MANDAMUS TO COUNTY AUDITOR—COMPLIANCE WITH MANDATE—APPEAL PRECLUDED—STAY BOND.—Where a *mandamus* has been granted by the superior court to compel the county auditor to issue his warrant for the amount of a claim allowed by the board of supervisors, the voluntary compliance of the auditor with the mandate precludes the prosecution of any appeal therefrom, either by him or by the county on his behalf, although a stay bond upon appeal has been dispensed with upon the order of the court.

ID.—CLAIM AGAINST COUNTY—ESTOPPEL OF JUDGMENT AGAINST AUDITOR—COUNTY NOT ESTOPPED—MONEY PAID UPON ILLEGAL DEMAND.—A judgment in *mandamus* to compel the county auditor to draw his warrant for the payment of a claim against the county, though it estops the auditor when made final by dismissal of an appeal therefrom, cannot estop the county which is not a party to the action. The county cannot be prejudiced by the dismissal of such appeal;

nor does the act of the county auditor in complying with the mandate of the court have any other effect upon the rights of the county to recover money paid upon an illegal demand than it would have had if no legal proceedings had been commenced.

APPEAL from a judgment of the Superior Court of Santa Clara County. W. G. Lorigan, Judge ruling upon demurrer.

A. S. Kittredge, Judge rendering judgment.

The facts are stated in the opinion of the court.

James H. Campbell, District Attorney, for Appellant.

Jackson Hatch, for Respondent.

BEATTY, C. J.—This is a proceeding in mandate to compel the defendant, as county auditor, to draw his warrant for the amount of a claim allowed by the board of supervisors. By general demurrer the defendant questioned the legality of the claim. The demurrer was overruled, and, defendant failing to answer, plaintiff had judgment, from which defendant appealed. But although an order was made dispensing with a stay bond, and notwithstanding the stay of proceedings, the defendant has drawn his warrant, as commanded by the judgment of the superior court, and the judgment has been satisfied. Respondent, therefore, moves to dismiss the appeal, upon the ground that it has become a moot case. Counsel for appellant, who is at the same time district attorney of the county, concedes that the voluntary compliance of the defendant with the mandate of the superior court, and the satisfaction of the judgment, would ordinarily be sufficient ground for the dismissal of the appeal, but he insists that in this case the county is the real party in interest, and that the appeal, though in form an appeal by the auditor, is in substance and effect an appeal by the county, whose rights cannot be prejudiced by the voluntary act of the nominal defendant. To sustain this contention he refers us to section 8 of the County Government Act, which makes it the duty of the district attorney, without any order from the board of supervisors, to sue for the recovery of all moneys paid out of the county treasury upon illegal demands, and he argues that, since neither the auditor nor treasurer can prejudice the rights of the county by paying an illegal claim before suit, they cannot be allowed to

do so after suit—a result which, he says, would be accomplished if this judgment should be virtually affirmed by a dismissal of the appeal. We do not think, however, that any right of the county would be impaired by a dismissal of this appeal. The defendant, by his voluntary act, has prevented the county from prosecuting the appeal in his behalf, and, while the judgment may estop him, it cannot be held to estop the county, which is not a party to the action, and cannot control it. The act of the defendant in drawing his warrant after the stay of proceedings granted has no other effect as regards the rights of the county than it would have had if no legal proceedings had been commenced.

The appeal is dismissed.

Temple, J., and Henshaw, J., concurred.

[S. F. No. 2442. In Bank.—September 18, 1900.]

THE PEOPLE ex rel. ATTORNEY GENERAL, Respondent, v. CHARLES F. CURRY, Secretary of State, Appellant.

PROPOSED CONSTITUTIONAL AMENDMENT—CHANGE IN JUDICIAL SYSTEM—DUTY OF SECRETARY OF STATE—INJUNCTION.—It was the official duty of the secretary of state, at least twenty-five days prior to the last general election, to certify to the several county clerks of the state the proposed constitutional amendment No. 22 to article VI of the constitution, relating to a change in the judicial system, recommended at the last regular session of the legislature on March 18, 1899; and he cannot be enjoined from such certification at suit of the people. [Temple, J., and Harrison, J., dissenting.]

ID.—AMENDMENT PROPOSED AT SPECIAL SESSION.—Amendment No. 1 to the constitution, relating to a change in the judicial system proposed at the special session of the legislature on February 10, 1900, was not effective, not having been included in the proclamation convening the legislature in that session, and that proposed amendment could not supersede the previous amendment No. 22, proposed at the regular session of the legislature in 1899.

Id.—LIMITATION OF POWER AT SPECIAL SESSION.—The legislature has no power to legislate on any subjects at a special session other than those specified in the proclamation convening it in extraordinary session. Although the proposing of a constitutional amendment is not ordinary legislation, yet it is the exercise of a legislative function, and cannot be lawfully done at a special session, if not specified in the governor's proclamation convening the legislature.

Id.—LAW FOR SUBMISSION OF CONSTITUTIONAL AMENDMENTS—REPEAL OF ACT OF 1883—UNCONSTITUTIONAL RE-ENACTMENT—TITLE.—In the act of 1899 repealing the act of 1883 to provide for the submission of proposed amendments to the constitution to a vote of the people, the section purporting to re-enact the first section of the act of 1883 is unconstitutional, as not being expressed in the title of the repealing act.

Id.—CONSTRUCTION OF POLITICAL CODE—TIME FOR SUBMISSION OF PROPOSED AMENDMENT.—The amendments of 1899 to sections 1195 and 1197 of the Political Code, providing for the certification of a proposed amendment of the constitution by the secretary of state to the clerk of each county in the state "not less than twenty-five days before election," and providing for the printing of the question of adopting or rejecting the amendment upon the ballots, are to be construed as providing for the submission of the proposed amendment at the next general election after the proposal of the amendment. [Temple, J., and Harrison, J., dissenting.]

Id.—REASONABLE INTERPRETATION OF STATUTES—PRESUMPTION.—The interpretation of statutes must be reasonable, and lean strongly to avoid absurd consequences and even great inconvenience; and it is to be presumed that the legislature intended to impart to its enactments such a meaning as would render them operative and effective.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. F. H. Dunne, Judge.

The facts are stated in the opinion of the court.

Tirey L. Ford, Attorney General, George A. Sturtevant, Deputy Attorney General, and William M. Abbott, Deputy Attorney General, for Appellant.

The legislature, when lawfully convened, whether by virtue of the provisions of the constitution or by the governor's proclamation, can, when not restricted by constitutional provision, do anything at any extra session that it might at a regular session. (*Morford v. Unger*, 8 Iowa, 82; *McAffee v.*

Russell, 29 Miss. 84.) The proposing of a constitutional amendment is not "to legislate," within the meaning of section 9 of article V of the constitution, limiting the power "to legislate on any subjects other than those specified in the proclamation." The ordinary meaning of "to legislate" is to enact a law or laws. The rule is that we must presume that the words have been employed in their natural and ordinary meaning, unless we find technical words or words of science or art employed. (*Oakland Pav. Co. v. Hilton*, 69 Cal. 479-91; *Weill v. Kenfield*, 54 Cal. 113; *Green v. Weller*, 32 Miss. 650.) The mere proposal of a constitutional amendment is not an act of legislative power. (James on Construction of Constitution, secs. 574-79; *People v. Blanding*, 63 Cal. 338; *Hatch v. Stoneman*, 66 Cal. 633-38; *Oakland Pav. Co. v. Hilton*, *supra*; *Livermore v. Waite*, 102 Cal. 113-18; *Mullan v. State*, 114 Cal. 578, 585; *Hollingsworth v. Virginia*, 3 Dall. 378; *In re Senate Bill 31*, 25 Neb. 872; *State v. Mason*, 43 La. Ann. 590; *State v. Dahl*, 6 N. Dak. 81; *Nesbit v. People*, 19 Colo. 441-47; *State v. Cox*, 8 Ark. 436-44; *Hays v. Hays* (Idaho), 47 Pac. Rep. 732, 733; *Julius v. Callahan*, 63 Minn. 154.) The repealing act of 1883 never passed the legislature, and is void *in toto*, and the act of 1883 is still in force. Reference to the journals may be made to show this fact. (*Weill v. Kenfield*, *supra*; *People v. Thompson*, 67 Cal. 627; *Railroad Tax Cases*, 8 Saw. 293; 13 Fed. Rep. 724; *Spangler v. Jacoby*, 14 Ill. 297¹; *Field v. Clark*, 143 U. S. 649, note.) The fact that the repealing bill approved by the governor is radically different from that actually passed by both houses is fatal to the validity of the entire act. (*Prescott v. Trustees*, 19 Ill. 324; *Moog v. Randolph*, 77 Ala. 597; *Smithee v. Campbell*, 41 Ark. 471; *Brady v. West*, 50 Wis. 68; *Union Bank v. Commissioners of Oxford*, 119 N. C. 214; *Commissioners of Stanly County v. Snuggs*, 121 N. Y. 394; *Cohn v. Kinsley* (Idaho), 38 L. R. Ann. 74; *Brown v. Collier* (Idaho), 51 Pac. Rep. 417; *Ritchie v. Richards*, 14 Utah, 345; *In re New York etc. Bridge Co.*, 148 N. Y. 540; *Rode v. Phelps*, 80 Mich. 598; *State v. Wendler*, 94 Wis. 378.)

Anderson & Anderson, *Amici Curiae*.

¹ 53 Am. Dec. 571.

There is no law authorizing the submission of either of the proposed constitutional amendments to the people. Such submission requires a regularly enacted law in force for that specific purpose. (*Hatch v. Stoneman*, 66 Cal. 632, 634.) The act of 1883 is lawfully repealed, and the re-enactment of section 1 thereof in the repealing law is invalid, not being covered by the title. (Const., art. IV, sec. 24.) The Political Code, as amended in 1899, does not fix any time or specify any election at which a proposed amendment is to be submitted. (Pol. Code, secs. 1195, 1197.) The legislature does not provide, in either of these sections, that any proposed amendment shall be submitted, nor specify any time or election when they shall be submitted. Each only provides a portion of the machinery to be used when the legislature shall require it to be put in motion, which it has not done. There can be no valid amendment without a strict compliance with the constitutional requirement that "it shall be the duty of the legislature [i. e., the senate, assembly, and governor] to submit such proposed amendment or amendments to the people." (*Livermore v. Waite*, 102 Cal. 117, 118; 6 Am. & Eng. Ency. of Law, 2d ed., 904-06; *State v. Tooker*, 15 Mont. 8; *Nesbit v. People*, 19 Colo. 441; *Wells v. Bain*, 75 Pa. St. 39²; *State v. Swift*, 69 Ind. 518, 519; *Edwards v. Lesueur*, 132 Mo. 410; *Koehler v. Hill*, 60 Iowa, 550; *Collier v. Frierson*, 24 Ala. 108.) The addition of matter in an enrolled bill which was not enacted, if distinguishable from the rest, does not affect the validity of the part enacted; and if the re-enacting section, which is inconsistent with the title of the repealing act, was not in fact passed, it does not affect the validity of the distinct and substantial repeal, which was the avowed object of the repealing act, and did pass the legislature. (25 Am. & Eng. Ency. of Law, 186; *Berry v. Baltimore etc. Ry. Co.*, 41 Md. 446³; *State v. Deal*, 24 Fla. 293⁴; *State v. Platt*, 2 S. C. 150.⁵)

Thomas D Riordan, and Edward Lande, for Respondent.

The secretary of state has an official, ministerial, and imperative duty resting upon him to comply with section 1195

² 15 Am. St. Rep. 563.

³ 20 Am. Rep. 69.

⁴ 12 Am. St. Rep. 204.

⁵ 16 Am. Rep. 647.

of the Political Code, as to the constitutional amendment No. 22, regularly proposed by the last legislature; and he cannot be restrained from performing that imperative duty in a matter of public interest. (Thropp on Public Offices, sec. 547; *Phelps v. Hawley* 52 N. Y. 27; *Martin v. Mayor, etc.*, 1 Hill, 545; Mechem on Public Offices and Officers, secs. 21, 523; *State v. Buchanan*, 24 W. Va. 373.) It must be presumed that the legislature intended to make that section of the code effective. (Black on Interpretation of Laws, 112 and cases cited.) The interpretation of laws should lean strongly to avoid absurd consequences, injustice, and even great inconveniences, for the legislative meaning is to be carried out, and it cannot be supposed to be any of these. (Bishop on Written Laws, c. IX.) Section 1195 of the Political Code, construed in connection with the statute of 1883, repealed when it was passed, and in connection with sections 1041 and 1043 of the same code, plainly contemplates the submission of a proposed constitutional amendment at the next general election after its proposal by the legislature.

VAN DYKE, J.—This is an action brought to restrain the defendant, as secretary of state, from certifying to the county clerks of the several counties of the state the proposed senate constitutional amendment No. 22, adopted at the regular session of the legislature, March 18, 1899. A general demurrer was filed to the complaint, which was sustained by the court below, and, the plaintiff declining to amend, judgment was entered for the defendant; and this appeal is taken from said judgment.

It is alleged in the complaint that, in addition to the duties prescribed in the constitution of the state of California, it is by law made the duty of the secretary of state to certify all proposed amendments to the constitution to the county clerk of each county, and the clerk of each county thereafter to include the same in the preparation, arrangement, and printing of ballots, and the performance of other acts, as provided by law, for the purpose of submitting the same to the qualified electors of the state for the popular vote. That the performance of such duties by the secretary of state involves and

makes necessary the expenditure of large sums of money, payable from the funds in the hands of the treasurer of said state, derived from taxation; and that at the thirty-third regular session of the legislature, commencing January 2, 1899, and on March 18, 1899, there was duly and legally adopted, two-thirds of all the members elected to each house of the legislature voting in favor thereof, a joint resolution proposing to the people of the state of California an amendment to the constitution, by amending sections 1, 2, 3, 4, 10, 12, 14, 16, 17, 18, 21, 23, and 24, of article VI thereof relating to the judiciary and establishing courts of appeal which said joint resolution is known as senate constitutional amendment No. 22 a copy of which is attached to the complaint and made a part thereof. The complaint further states that at the extraordinary session of the legislature of the state of California, commencing on the twenty-ninth day of January, 1900, and on the tenth day of February, there was duly and regularly adopted, two-thirds of all the members elected to each of said houses of the legislature voting in favor thereof, a joint resolution proposing to the people of this state an amendment to the constitution of said state, by amending article VI thereof relating to the judiciary and establishing courts of appeal, which said joint resolution is known as senate constitutional amendment No. 1, a copy of which is attached to the complaint and made part thereof. It is further alleged that said senate constitutional amendment No. 1, adopted by the legislature at its extraordinary session, was intended to, and does in fact, supersede and render null and void senate constitutional amendment No. 22, adopted by the legislature at its thirty-third regular session, to wit, on March 18, 1899. That, notwithstanding such fact, the said defendant, as secretary of state, proposes and intends, unless restrained, to certify to each of the county clerks of the several counties of the state the proposed constitutional amendment designated as senate constitutional amendment No. 22, and that the carrying out of such threatened acts by defendant will take from the funds of the state of California, and from the respective counties thereof, derived from the taxation of the people and of the tax bearers, money without any authority of law and for an unlawful

purpose. Wherefore, it is prayed that the said defendant, the secretary of state, be restrained and enjoined from in anywise certifying to the county clerks of the respective counties the proposed said senate constitutional amendment No. 22, or from the preparation, arrangement, printing, or distribution of any ballots, or the performance of any act whatever, for submission to the qualified electors for popular vote, of the said proposed constitutional amendment.

In the brief of the attorney general, on behalf of the appellant, it is contended that the defendant, as secretary of state, should not certify constitutional amendment No. 22, adopted at the regular session in 1899, but that he should certify senate constitutional amendment No. 1, adopted by the legislature at its extraordinary session in February, 1900. This contention is based upon the claim that the legislature in extraordinary session has the power to propose to the qualified electors of the state amendments to the constitution, even though the question of proposing amendments was not mentioned or specified in the proclamation of the governor convening the said legislature. It is conceded by the attorney general that the governor's proclamation omitted entirely to mention the subject of proposing constitutional amendments; and it is also conceded to be the duty of the defendant to certify proposed amendments to the constitution to the county clerks, but the question to be determined is, which of the proposed amendments to the judiciary article should be certified; appellant contends, as already stated, that the one proposed at the extra session should be certified, and not the one proposed at the regular session.

By the constitution the sessions of the legislature shall commence on the first Monday after the first day of January next succeeding the election of its members, and shall be biennial, "unless the governor shall in the interim convene the legislature by proclamation." (Const., art. IV, sec. 2.) The constitution, under the article in reference to the executive department, in defining the duties of the governor, provides that "he may, on extraordinary occasions, convene the legislature by proclamation, stating the purposes for which he has con-

vened it; and when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation, but may provide for the expenses of the session and other matters incidental thereto." (Const., art. V, sec. 9.)

The attorney general contends that proposing constitutional amendments is not "to legislate on any subjects other than those specified in the proclamation, and, therefore, does not fall within this provision of the constitution.

It may be admitted that proposing constitutional amendments is not legislation in the sense of passing statutory laws, but it is nevertheless performing a legislative function. It is one of the modes pointed out to initiate the enactment of constitutional law. The performance of such a duty is neither executive or judicial, but purely legislative. No one would contend that the senate and assembly could propose constitutional amendments, except at the session of the legislature and while it is in session, and not before or afterward—that is, both houses in session, which constitute the legislature. The resolution to the proposed amendment follows the usual form in such cases, and reads: "The legislature of the state of California, . . . two-thirds of all the members elected to each house of said legislature voting in favor thereof, hereby proposes," etc. The provision in reference to proposing constitutional amendments is something similar to that in reference to the approval or ratification of city charters framed by freeholders. "Such approval may be made by concurrent resolution, and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city," etc. (Const., art. XI, sec. 8.)

The governor takes no part in the adoption of freeholders' charters, any more than in proposing constitutional amendments; yet the adoption of a city charter in the mode provided is legislation, although not in the same manner as passing bills; it creates, or participates in creating, a municipal government which can only be done by legislative power. It will hardly be contended that the action of the two houses of the legislature in approving or adopting a freeholders' charter can be done at an extra session, when that subject is not specified in the governor's proclamation. *People v. Blanding*, 63 Cal. 333, does not sustain the contention of the ap-

pellant. That was a case of the confirmation by the senate of an appointee of the governor. And it is said that the provision in the constitution in reference to legislation other than that specified in the proclamation does not apply in such a case, that being the independent action of the senate and not in the nature of legislation at all. It frequently occurs that the senate of the United States is convened, without calling together Congress, for the purpose of confirming presidential appointments. Particularly is this the case on the coming in of a new administration. The other cases referred to by the attorney general, such as *Hatch v. Stoneman*, 66 Cal. 633, and *Mullan v. State*, 114 Cal. 578, simply hold that the proposal of amendments to the constitution is not made by the legislature as in the ordinary enactment of a law.

The evident purpose of the restriction placed upon the action of the legislature when called together in extraordinary session by proclamation was to regulate the duration of such session, and thus diminish expenses, and the court should not, by a strained or strict construction, defeat these purposes. We are therefore, of the opinion, for the reasons stated, that the proposed constitutional amendment proposed at the extra session of the legislature of 1900 is invalid, and that the defendant, as secretary of state, is justified in certifying the amendment proposed at the regular session of 1899, in lieu thereof.

This disposes of the questions raised by the attorney general on the appeal adversely to the appellant. The case, however, being one of great public importance, permission was given to certain attorneys to file a brief as *amici curiae*, which has been done, and a reply brief thereto has been filed on the part of the respondent. In the brief filed by the *amici curiae* it is contended that there is now no law whatever for the submission of constitutional amendments, and in support of this contention they refer to the act of 1899 repealing the act of 1883, under which constitutional amendments have been previously submitted to a popular vote. (Stats. 1899, p. 24.) The title of the repealing act is as follows: "An act to repeal an act entitled 'An act to provide for the submission of proposed amendments to the constitution of the state of California to the qualified electors for their approval,' ap-

proved March 7, 1883, relating to the manner of publishing such proposed amendments."

Following this title, the first section of the act reads: "An act to provide for the submission of proposed amendments to the constitution of the state of California to the qualified electors for their approval, adopted March 7, 1883, is hereby repealed."

Then follows another section 1, in the same statute, which purports to re-enact substantially the first section of the act of 1883, which, it will be seen, the first section 1 had already repealed. Counsel state in their brief that, aside from the fact that the second section is not covered by the title, it was never enacted by the legislature, "and finds a place in the printed statutes as a part of the act in question solely by reason of some engrossing clerk's blunder," referring to certain pages of the senate and assembly journals to support this contention.

According to the view we take of this branch of the case it is unnecessary, however, to consult the legislative journals, inasmuch as the subject matter embraced in the so-called second section 1 is not that expressed in the title of the act. "If any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title." (Const., art. IV, sec. 84.) This eliminates the second section 1 from the act in question, and it stands, therefore, simply as an act repealing the former act of 1883. The act of 1883, so repealed, reads as follows: "Whenever the legislature shall propose any amendment or amendments to the constitution of this state, which amendment shall have been passed in the manner and form required by section 1 of article XVIII of the constitution, and no other mode is provided by law for the submission of such amendment or amendments to the people for their approval, it shall be the duty of the governor to advertise such proposed amendment or amendments in at least four newspapers of general circulation in this state for three months next preceding the next general election. One of said newspapers must be published at the city of Sacramento and two at the city of San Francisco; and in issuing his proclamation for an election at which any amendment or amendments to the constitution are to be voted upon, he

shall include such amendment or amendments therein, and he shall designate them by number in the order in which they have been proposed."

Bearing the same date as the repealing act in question, the legislature passed the following amendment to the Political Code (Stats. 1899, p. 72):

"Section 1. Section 1195 of the Political Code is amended to read as follows:

"1195. Whenever the legislature shall propose any amendment to the constitution of this state, which amendment shall have been passed in the manner required by section 1 of article XVIII of the constitution, or whenever said legislature shall submit any proposition to a vote of the qualified electors of the state, the secretary of state shall duly, and not less than twenty-five days before election, certify the same to the clerk of each county of the state; shall cause to be printed at the state printing-office, in convenient form, one and one-half times as many copies of such amendment or proposition as there are registered voters in the state; and at least thirty days before any election at which such amendment or proposition is to be voted on, shall furnish each county clerk in the state with one and one-half times as many copies as there are registered voters in his county. The clerk of each county shall thereafter cause to be mailed to each voter a copy of said constitutional amendment or other proposition at the same time and at the same manner, and in the same envelope, provided for in section 1194 of this code, and no other publication thereof shall be necessary or authorized."

And at the same session passed an act amending section 1197 of the Political Code, in reference to the form of ballots, by adding thereto the following: "Whenever any question or constitutional amendment is to be submitted to the vote of the people, there shall be printed another column or columns, with voting squares at the right of the last or blank column in which such question or constitutional amendment shall be printed, and opposite such question or constitutional amendment to be voted on, in separate lines the words 'Yes' or 'No' shall be printed.' If the elector shall have stamped a cross (X) in the voting square after the printed word 'Yes,' his vote shall be deemed to be in favor of the adoption of the

question or constitutional amendment, if he shall have stamped a cross (X) after the printed word 'No,' he shall be deemed to be against the adoption of the same."

It is further contended by the *amici curiae* that the amendment to the Political Code did not specify the time or the election at which proposed amendments shall be submitted, that it only relates to the publication of such amendment. But the same may be said of the act of 1883; that did not provide at what election nor at what time the proposed amendment should be submitted. It simply directed the governor to advertise such proposed amendment or amendments in at least four newspapers of general circulation in this state for three months next preceding the next general election, and to include the same in his proclamation. By the amendment to the code in question whenever the legislature shall propose an amendment the secretary of state shall, not less than twenty-five days before election, certify the same to the clerk of each county of the state, and have printed in convenient form the copies mentioned, and at least thirty days before any election at which such amendment is to be voted on shall furnish each county clerk in the state with the copies therein mentioned.

The act of 1883, however, notwithstanding its defects in the respects mentioned, has been considered sufficient to authorize the submission of proposed constitutional amendments to a vote of the people. Not less than sixteen different amendments to the constitution have been submitted under the act of 1883, and by the people ratified. This court has repeatedly recognized the validity of these amendments as forming a part of the constitution. (*People v. Strother*, 67 Cal. 624; *Martin v. Election Commrs.*, 126 Cal. 410.) It is significant that the amendment to section 1195 of the Political Code was passed the same day as the act repealing the act of 1883—the substantial difference between the act of 1883 and the amendment to the code being only in regard to publication.

It can be fairly implied that when the law directs the secretary of state to provide copies of the proposed amendments so many days before election, it means the next general election after they have been so proposed.

At the regular session of 1889 seven separate amendments were proposed by the legislature. Among the number are some of very great public importance. The one under consideration is intended to relieve the congested condition of the supreme court so as to expedite the disposal of causes on appeal. Another is to empower the legislature to pass a primary election law, special in character, if deemed advisable. It would be a violent presumption to suppose that the legislature, which by a two-thirds vote in each house had just proposed such important amendments to the constitution, should deliberately repeal the only act under which such amendments could be submitted to the voters, without providing some other mode for accomplishing the same purpose.

"There must be held throughout the state on the first Tuesday after the first Monday of November . . . in every second year . . . an election to be known as the general election." (Pol. Code, sec. 1041.)

"Special elections are such as are held to supply vacancies in any office, and are held at such times as may be designated by the proper board or officer." (Pol. Code, sec. 1043.)

"Special elections are held in counties for the purpose of filling vacancies in office." (Act Concerning Special Elections, passed February 9, 1878, Stats. 1877-78, p. 73.)

The election referred to in the amended code cannot, therefore, be a special election, but must be a general election. And, taking into consideration the various provisions of law on the subject, the word "election" mentioned in connection with the duties imposed upon the secretary of state and the various county clerks in the preparation and distribution of the proposed amendments can mean only the next general biennial state election. (Civ. Code, sec. 3538.)

"It is presumed that the legislature intended to impart to its enactments such a meaning as would render them operative and effective." (Black on Interpretation of Laws, 112, and cases cited.) "Interpretation must be reasonable." (Civ. Code, sec. 3542.)

The interpretation should lean strongly to avoid absurd consequences, and even great inconvenience; for the legislative meaning is to be carried out, and it cannot be supposed.

to be any of these. Great public interests will not needlessly be put at hazard by the interpretation. (Bishop's Written Laws, c. 19.)

Judgment affirmed.

McFarland, J., Garoutte, J., Henshaw, J., and Beatty, C. J., concurred.

TEMPLE, J., dissenting.—I dissent. As to the mode of submitting proposed amendments to the constitution, the constitution provides: "It shall be the duty of the legislature to submit such proposed amendment or amendments to the people in such manner, and at such time, and after such publication, as may be deemed expedient."

In my opinion the legislature has not directed at what time the proposed amendments shall be submitted to the people, and, in the absence of such direction, they cannot legally be submitted. The legislature, when it convenes, could and should provide for a referendum, and, should it do so, the vote upon such submission would control, and a vote at the coming election, in the present condition of the law, would count for nothing.

The main, if not the only, argument to the contrary is that the law of 1883 did not expressly provide a time for the submission of such amendments, and yet several amendments have been adopted under it, the validity of which has not been questioned on that ground. Since no question of that kind has ever been raised or considered by this or any court, the argument at best is but a weak one. But there is no basis for the argument. The law of 1883 did, by clear and unmistakable implication, provide that the amendment should be voted upon at the next general election. This appears from the language of the act, as set out in the principal opinion. The section of the Political Code referred to contains no equivalent provision. It is but a section in the title concerning elections, and which provides rules and regulations as to all elections whenever they shall occur. There are over three hundred section in the title, all of this character. It is part of the procedure prescribed for conducting elections, and comes into action whenever an election is provided for. Instead of requiring the publication three months, or for any fixed time before the next general election after the

amendments have been proposed, it merely directs the publication at least "thirty days before any election at which such amendment or proposition is to be voted on"—clearly in itself implying that the time for submitting the amendment is to be otherwise fixed.

The practice has not been uniform to submit constitutional amendments at a general election. In 1887 such proposed amendments were submitted at a special election.

Harrison, J., concurred in the dissenting opinion.

Rehearing denied.

[S. F. No. 2305. Department Two.—September 21, 1900.]

PATRICK HOBAN, Executor, etc., Respondent, v. PATRICK RYAN and MARY RYAN, Appellants.

UNLAWFUL DETAINER—TREBLED DAMAGES—JURISDICTION OF JUSTICE'S COURT.—A justice's court has no jurisdiction of an action for unlawful detainer, though the rent is only ten dollars per month, where the whole amount of rent alleged to be due and unpaid aggregates one hundred and twenty dollars, and the complainant seeks that the same be trebled as damages for the unlawful detention.

ID.—TEST OF JURISDICTION—AMOUNT SUED FOR.—The test of the jurisdiction of the justices' courts, whether exclusive or concurrent, is the same as that of the superior courts, viz., "the amount sued for, exclusive of interest."

ID.—"AMOUNT OF DAMAGES CLAIMED."—The provision of the constitution limiting the jurisdiction of the justices' courts in actions for forcible entry and detainer to cases where the "whole amount of damages claimed exceeds two hundred dollars," is intended to exclude such jurisdiction where the whole amount of the trebled damages claimed for the unlawful detention exceeds two hundred dollars.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion.

Sullivan & Sullivan, for Appellants.

The justice's court had no jurisdiction of the action, the amount claimed and recoverable as damages being greater than that allowed by the constitution and the statute. (Const., art. VI, sec. 11; Code Civ. Proc., secs. 113, 1174; *Ballerino v. Bigelow*, 90 Cal. 500; *Shealor v. Superior Court*, 70 Cal. 565.) The amount sued for, exclusive of interest, is the test of jurisdiction. (*Solomon v. Reese*, 34 Cal. 33; *Pennybecker v. McDougal*, 48 Cal. 161; *Derby v. Stevens*, 64 Cal. 287.)

George D. Shadburne, for Respondent.

The justice's court had jurisdiction. The rent was less than twenty-five dollars per month, and the amount due was less than two hundred dollars. The proof only goes to the amount of rent, or of actual damage shown, and the trebling done is merely a penalty fixed by the statute and to be assessed by the jury. (Code Civ. Proc., 1174.)

SMITH, C.—The suit was brought in the justice's court of the city and county of San Francisco for the unlawful detainer of a lot in that city, and for the recovery of possession and the value of the use and occupation. The case was carried by appeal to the superior court, where judgment was rendered for the plaintiff for the restitution of the premises and for the sum of one hundred and fifty dollars and costs. The defendants appeal from the judgment and from an order denying a new trial.

The complaint alleges that the value of the use and occupation of the premises during the time it was occupied by the defendants was ten dollars a month and in the aggregate one hundred and twenty dollars, and the prayer is "for the restitution of said premises and for one hundred and twenty dollars for the use and occupation of said premises, and that the same may be trebled as damages for the unlawful detention thereof, besides costs of suit." A demurrer to the complaint was interposed on the ground of want of jurisdiction, and it is now claimed that the judgment should be reversed on this ground.

The point, we think, must be sustained. It is settled in this state, with reference to the statutory and constitutional provisions determining the jurisdiction of the superior courts, and the exclusive jurisdiction of the justice courts (Code Civ. Proc., sec. 112; Const., art. VI, sec. 5); that "the amount sued for, exclusive of interest, is the test of jurisdiction" (*Solomon v. Reese*, 34 Cal. 33; *Sanborn v. Contra Costa Co.*, 60 Cal. 427; *Dashiel v. Slingerland*, 60 Cal. 653; *Shealor v. Superior Court*, 70 Cal. 565, and other cases); and the principle must also apply to the concurrent jurisdiction of the justices' courts as determined by the provisions of section 11 of the same article of the constitution and the corresponding provisions of the code—which are in the same language. (Code Civ. Proc., secs. 113, 1163.) The question of jurisdiction must, therefore, depend upon the construction of the language used in the constitutional provision cited; which is, "that said justices shall have jurisdiction in cases of forcible entry and detainer, where the rental value does not exceed twenty-five dollars per month, *and where the whole amount of damages claimed does not exceed two hundred dollars.*" Or, rather, the question depends on the construction of the clause italicized, and especially on the definition of the word "damages." If this term is to be construed as including the whole amount sued for—that is to say, not merely the alleged value of the use and occupation, but the amount to be adjudged—then the case was beyond the jurisdiction of the justice's court. But the meaning of the term is well settled. "Damages [are] the indemnity recoverable by a person who has sustained an injury; . . . the sum claimed as such indemnity by a plaintiff in his declaration"; and the term includes not only "compensatory," but also "exemplary" or "punitive" or "vindictive," and "double or treble damages." (Bouvier's Law Dictionary, word "Damages.") At common law "double or treble damages" were often allowed by statute (Bouvier's Law Dictionary, word "Measure of Damages," *ad finitum*); and, especially in forcible entries or detainers, "treble damages to the party grieved." (3 Blackstone's Commentaries, 179.) There can be no doubt, therefore, that the term "damages" includes the whole amount to be adjudged; and that it is so used here is indicated by the peculiar form of the expression, viz., "the whole amount of

damages claimed," which would lack force if compensatory damages only were intended. It may be added that the technical is quite in accord with the popular meaning of the term. Hence, naturally enough, the prayer of the complaint is for the treble amount "as damages for the unlawful detention." Nor is it reasonable to assign to the convention the intent to give to justices' courts in this particular case jurisdiction to an amount double the amount of three hundred dollars, by which their ordinary jurisdiction is determined.

The constitutional provision has been in fact construed by the legislature in accordance with the views here expressed. In sections 113 and 1163, in prescribing the jurisdiction of justice's court in cases of forcible entry and detainer, the language of the constitution is used. But could this be construed as giving jurisdiction in cases where the amount demanded exceeds three hundred dollars, it would be in conflict with subdivision 4, section 112, of the Code of Civil Procedure; where the jurisdiction of justice's court "in actions for a fine, penalty, or forfeiture" is limited to three hundred dollars. For—as is in fact claimed by the respondent—there can be no doubt that, "of the whole amount of damages claimed," a two-thirds part is a penalty. We would thus have the case of two consecutive sections of the code, in the first of which the jurisdiction in the case of all penalties is limited to three hundred dollars, and in the second extended, in this one case, to six hundred dollars.

We advise, therefore, that the judgment and order denying a new trial be reversed, and the cause remanded with directions to dismiss the action for want of jurisdiction. (*Ballerino v. Bigelow*, 90 Cal. 503.)

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed and the cause remanded, with directions to dismiss the action for want of jurisdiction.

Henshaw, J., Temple, J., McFarland, J.

Hearing in Bank denied.

[Sac. No. 661. Department Two.—September 21, 1900.]

JOHN McCORMICK, Appellant, v. STOCKTON AND TULUMNE COUNTY RAILROAD COMPANY and ANNIE KLINE RIKERT, Respondents.

ACTION UPON JOINT AND SEVERAL NOTE—EXECUTION BY CORPORATION—GENUINENESS OF SIGNATURES—ADMISSIONS OF ANSWER—DENIAL OF EXECUTION.—In an action upon a joint and several note, signed by a person designated as president of a corporation defendant, and by the same person designated “personally,” where the note was set out in the complaint and the delivery of it was not denied, and there was no denial of the signatures of the person so designated in the note, a mere denial of the execution of the note by the corporation amounts only to a denial of its subscription of the instrument, which was not alleged, and the answer must be construed as admitting the genuineness of the actual signatures to the note.

ID.—EVIDENCE—FAILURE TO OBJECT TO NOTE—OFFICIAL RELATION ADMITTED—SUPPORT OF FINDING.—The placing of the note in evidence without objection, and with the admission made by the defendants that the person who signed the note was the president of the corporation, was in effect an admission of the genuineness of signatures of such person; and it was not necessary that the plaintiff should prove such signatures in order to support a finding that such person “made, executed, and delivered” the note to plaintiff.

ID.—AUTHORITY OF PRESIDENT—RESOLUTION OF BOARD.—A resolution of the board of directors of the corporation defendant conferring on the president, as “the agent and chief executive of the board,” the power “to incur indebtedness, to negotiate loans, to enter into contracts and agreements, . . . and otherwise to act as agent of the corporation,” is within the powers of the board, and confers upon the president the power to execute a note of the corporation.

ID.—BY-LAW—SIGNATURE OF SECRETARY.—A by-law of the corporation providing that notes or obligations “signed officially by the president and secretary shall be binding on the corporation” does not necessitate the signature of the secretary in order to bind the corporation by a note which the board has authorized the president to execute.

ID.—NOTE BINDING UPON CORPORATION.—The joint and several note so executed by the same person, followed by the designation of such person as president of the corporation defendant, and again followed by the designation “personally,” clearly shows that the first signature was for the corporation, as distinguished from the second

personal signature; and the president having power to bind the corporation, the note as signed is a clear, intentional, and legally sufficient exercise of that power, and is binding upon the corporation.

APPEAL from a judgment of the Superior Court of San Joaquin County. Joseph H. Budd, Judge.

The facts are stated in the opinion.

Louttit & Middlecoff, and W. W. Middlecoff, for Appellant

The resolution of the directors of March 15, 1898, fully authorized the president to execute this note. (Civ. Code, secs. 303, 305, 354, subd. 5, secs. 2296-2304; 1 Morawetz on Corporations, secs. 534-38; *Oakland Pav. Co. v. Rier*, 52 Cal. 270, 277; *McKiernan v. Lenzen*, 56 Cal. 61; *Seeley v. San Jose etc. Co.*, 59 Cal. 22; *Jennings v. Bank of California*, 79 Cal. 328¹; *Siebe v. Joshua Hendy Machine Works*, 86 Cal. 390; *Greig v. Riordan*, 99 Cal. 316; *Bates v. Coronado Beach Co.*, 109 Cal. 160; *Hawley v. Gray Bros. etc. Co.*, 106 Cal. 337.) The note signed by the president of the company is the contract of the corporation, and the intent to bind the corporation is plainly inferable from the terms of the instrument and a signature thereto. (Civ. Code, sec. 2337; *Farmers' etc. Bank v. Colby*, 64 Cal. 352; *Hobson v. Hassett*, 76 Cal. 203.²) Section 4 of article IV of the by-laws does not require that the signature of the secretary shall be present in all cases, and this note authorized by the board is not void under that by-law. (*Hawley v. Gray Bros. etc. Co.*, *supra*.) The by-law is only directory at most, and cannot invalidate a contract made by an authorized agent of the corporation with a third party. (4 Thompson on Corporation, sec. 5023; *Warren v. Ocean Ins. Co.*, 16 Me. 439³; 2 Morawetz on Corporations, secs. 673, 675.) There is no evidence that plaintiff had notice of the by-law, and it does not bind him. (2 Morawetz on Corporations, secs. 593-98; *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300.) As the president is shown to have owned the majority of all the stock of the corpora-

¹ 12 Am. St. Rep. 145.

² 9 Am. St. Rep. 193.

³ 33 Am. Dec. 674.

tion, her act in giving the note was sufficient to bind the corporation. (*Underhill v. Santa Barbara etc. Co.*, *supra*; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67; *Bates v. Coronado Beach Co.*, *supra*; 2 Morawetz on Corporations, 618-48.)

McNoble & McNoble, and J. J. Burt, for Respondents.

There is no proof of the execution of the note. There is no presumption of authority to sign it (*Deane v. Gray Bros. etc. Co.*, 109 Cal. 433), and the note is the personal note of Annie Kline Rikert only. (*Chamberlain v. Pacific etc. Co.*, 54 Cal. 103; *Hobson v. Hassett*, 76 Cal. 203.⁴) The trustees were a delegated body, and could not delegate all their powers to their president. (*San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549.)

THE COURT.—Suit on promissory note of date July 30, 1898, for five thousand seven hundred and ten dollars, with interest, etc. Judgment was rendered for plaintiff against the defendant Rikert, and for the defendant corporation against the plaintiff for costs. The appeal is from the latter judgment; and the sole question involved is whether the note sued on was the note of the latter defendant.

The note is signed, "Annie Kline Rikert, Pres. Stockton and Tuolumne Co. R. R. Co. Annie Rikert Personally," and is set out at length in the complaint. The answer of the defendant corporation denies that it "made, executed, or delivered to plaintiff the promissory note" sued on. The court found that the defendant Rikert "made, executed, and delivered" the note to plaintiff; and that the defendant corporation "never made, executed, or delivered" it. It is claimed on behalf of the appellant that the evidence was insufficient to justify the latter finding.

The plaintiff's evidence on this point consisted of a resolution of the board of directors of the corporation of date March 5, 1898—conferring on the president, as "the agent and chief executive of the board," the power "to incur indebtedness, negotiate loans, to enter into any contracts or agreements, . . . and otherwise to act as the agent of the corporation"—and the note itself, which was produced from

⁴ 9 Am. St. Rep. 193.

the custody of the plaintiff, was put in evidence without objection on the part of the defendants, and with their admission that the defendant Rikert was, and ever since December 27, 1897, had been, president of the defendant corporation.

This evidence would seem to be sufficient to support the appellant's contention; but it is urged, on behalf of the respondent, in support of the finding, that there was no evidence of the genuineness of the president's signature to the note; that it did not appear that she had the power to sign it on behalf of the corporation; and that the note on its face appears "to have been the personal note of Annie Kline Rikert only."

1. With regard to the first point, we do not understand the answer of the defendant to make any issue as to the genuineness of the signature. The note is set out in the complaint, and its delivery is admitted and found. As to the execution of it, the denial is simply that it was executed by the defendant corporation; which—as the delivery of the note is admitted—amounts merely to a denial of the subscription of the instrument by the corporation (Code Civ. Proc., sec. 1933), which was never alleged. The answer must, therefore, be construed as admitting the genuineness of the note—i. e., the genuineness of the actual signatures. (Code Civ. Proc., sec. 447; *Abbott's Law Dictionary*, *Anderson's Law Dictionary*, *Black's Law Dictionary*, *Bouvier's Law Dictionary*, word "Genuine"; *Baldwin v. Van Deusen*, 37 N. Y. 489; *Cox v. Northwestern Stage Co.*, 1 Idaho, 376, 380.)

Accordingly, the court finds that Annie Kline Rikert "made, executed, and delivered" the note to the plaintiff; which is in effect a finding of the genuineness of both her signatures. Hence the finding objected to cannot be construed as a finding to the contrary. Otherwise we would have to regard it as contrary, not only to the admissions of the pleadings, but to the evidence; for the note was read in evidence without objection; and this—under the circumstances—was in effect an admission of the genuineness of the signatures. (1 Hayne on New Trial and Appeal, sec. 98.)

2. The execution of the note was clearly within the powers conferred upon the president by the resolution of March 5,

1898; and the resolution itself was within the powers of the board. (*Hawley v. Gray Bros. etc. Co.*, 106 Cal. 337; Civ. Code, sec. 2319; Morawetz on Corporations, sec. 538; *McKiernan v. Lenzen*, 56 Cal. 61.)

With regard to the point—which seems to have been urged in the court below—that under section 4 of article IV of the by-laws, the signature of the secretary was necessary to give validity to the note, it will be sufficient to say that the provision in question does not require the secretary to sign all notes and obligations, but simply that notes or obligations “signed officially by the president and secretary shall be binding on the corporation”; and that precisely the same point was involved in *Hawley v. Gray Bros. etc. Co.*, *supra*, and fully discussed in the briefs.

3. The court erred in holding that the note is not the note of the corporation defendant. It has undoubtedly been held that a note with no mention of a corporation, or other principal, in the body of it, and merely signed “John Do, president,” or “agent,” or even “president” of a named corporation, is not a note of the corporation or other principal. Such was the case in *Hobson v. Hassett*, 76 Cal. 203,⁵ and *Chamberlain v. Pacific etc. Co.*, 54 Cal. 103, cited by respondent. But within the principle announced and the authorities cited in *Hobson v. Hassett*, *supra*, the note in the case at bar would clearly be the note of the corporation. In the Chamberlain case the form of the obligation in the body of the note was “I promise to pay,” and there was one signature, which was “D. P. Sackett, president” of the named corporation. In the case at bar the form of the obligation is “we or either of us promise,” and the note is signed, first “Annie Kline Rikert, Pres. Stockton and Tuolumne Co. R. R. Co.,” and then below “Annie Kline Rikert personally.” This clearly shows that the first signature was for the corporation, and the second for herself personally; and having power to bind the corporation, the note, as signed, is a clear, intentional and legally sufficient exercise of that power. The case is similar to that of *Farmers’ etc. Bank v. Colby*, 64 Cal. 352, where the note was signed “G. A. Colby, Prest. Pac. Peat Coal Co.,” and

⁵ 9 Am. St. Rep. 193.

"D. K. Tripp, Sec., pro tem.," and was "indorsed" by said Colby and some other persons; and the court said: "Read as a whole, we think it apparent from its face that it is the note of the company indorsed by the individuals," and that "promissory notes, like other instruments, must be given that effect which accords with the obvious intent of the parties to them." It is not always necessary that the name of the principal shall be signed with the statement following "by the" agent, although that is no doubt the best form. In *Jones v. Clark*, 42 Cal. 180, the form of the note was "for and on behalf of the Dardenelles Mining Company I promise to pay," and it was signed "William Rufus Longley, superintendent for the company"; and the court said: "There can be no doubt that it is binding on the partnership, provided that Longley had authority to execute it." In *Southern Pac. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 368—where the signature of the president was held to bind the company, in a case not nearly as strong as the one at bar—there is an elaborate discussion of the subject and a citation of many authorities. (See Story on Agency, 9th ed., sec. 154; 1 Parsons on Notes and Bills, 90 et seq.)

The judgment appealed from is, as to the defendant corporation, reversed, and a new trial ordered.

Hearing in Bank denied.

[Sac. No. 658. Department Two.—September 21, 1900.]

COUNTY OF MONO, Appellant, v. P. L. FLANIGAN, Respondent.

LICENSE TAX—BUSINESS OF RAISING AND PASTURING SHEEP—TRANSPORTATION THROUGH COUNTY.—One who is engaged merely in transporting a herd of sheep across a county to his ranch in another county, and is not engaged in the business of raising, grazing, and pasturing sheep within the county, is not liable to a license tax upon that business.

ID.—ACTION FOR LICENSE TAX—TRIAL—CHALLENGE OF JUROR—RELATIONSHIP TO INTERESTED OFFICER.—Upon the trial by jury of an action to recover a license tax upon such business, a juror who is shown to be the brother of an officer employed by the county to collect such taxes, who by the terms of his employment is directly and beneficially interested in the enforcement of the license tax in question to the extent of ten per cent of the recovery, is properly challenged and excused for cause.

ID.—PLEADING—ALLEGED DATES OF BUSINESS—LIMITING OF EVIDENCE.—Under a complaint in such action which charges the defendant with having engaged in the business or raising, grazing, and pasturing sheep within the county between the first day of June and the third day of July, the date of the filing of the complaint, the court properly limited the evidence to the acts of the defendant between those dates.

ID.—AMENDMENT OF COMPLAINT—SUBSEQUENT CAUSE OF ACTION.—The cause of action to enforce a license tax must be limited to business conducted by the defendant before the commencement of the action. No amendment to the complaint can be permitted to charge the defendant upon a cause of action arising after the commencement of the action.

TRIAL BY JURY—CHALLENGES FOR CAUSE—CONSTRUCTION OF CODE—CONSANGUINITY OR AFFINITY TO "PARTY"—BENEFICIAL INTEREST. Subdivision 2 of section 602 of the Code of Civil Procedure relating to trial by jury, which makes "consanguinity or affinity within the fourth degree to any party" a ground of challenge of a juror for cause, is to be liberally construed. It is not intended thereby to require that the "party" shall be in name a party to the litigation, but the provision is meant to cover the case of relationship to any party shown to be directly and beneficially interested in the result of the litigation, by any participation in the recovery.

ID.—CHALLENGE OF JUROR FOR ACTUAL BIAS—DISALLOWANCE—DISCRETION—REVIEW UPON APPEAL.—It is only where the evidence adduced upon the challenge of a juror for actual bias is such as plainly and clearly to show the bias of the juror, and the case is one in which the law manifestly leaves nothing to the conscience or discretion of the court, that the action of the court in disallowing it is reviewable upon appeal; and where such state of facts is not established, the ruling of the trial court will not be disturbed.

APPEAL from an order of the Superior Court of Mono County denying a new trial. W. H. Virden, Judge.

The facts are stated in the opinion of the court.

Richard S. Miner, for Appellant.

Reddy, Campbell & Metson, for Respondent.

HENSHAW, J.—Plaintiff brought its action against defendant to recover the sum of five hundred and fifty-one dollars, the amount of a license tax which it averred was due to it from defendant under the terms of an ordinance of the county exacting a license from all persons engaged in the business of “raising, grazing, and pasturing sheep” within the county. The cause was tried before a jury, which rendered its verdict for defendant. Judgment for defendant was entered in accordance with the verdict and from the order of the court refusing its motion for a new trial the county appeals. The complaint charged that the defendant “between the first day of June, 1897, up to and including the third day of July, 1897, was engaged in the business of raising, grazing, and pasturing sheep, to wit, about ten thousand head of sheep.” Upon the trial the validity of the ordinance was not assailed. The defense, however, was that the defendant did not come within its provisions, and that he was engaged merely in transporting his sheep across the county of Mono to his ranch in Sierra county as expeditiously as possible. If such was the fact, and there was sufficient evidence to sustain the contention, defendant was not compelled to pay the license tax. (*County of Inyo v. Erro*, 119 Cal. 119.)

Many minor points are made upon the appeal touching the impanelment of the jury and the admission and rejection of evidence. All have been considered, but only such as seem to merit attention will be here noticed. L. A. Murphey was challenged for cause by defendant, the challenge was allowed, and he was excused. It appeared that Murphey was a brother of E. A. Murphey, an executive officer of the county of Mono, employed to enforce, and actively interested in enforcing, the sheep license ordinance, under a contract with the county whereby he was to receive ten per cent of the license fees paid, including ten per cent of the proceeds of this particular case. The challenge was properly allowed. Section 602, subdivision 2, of the Code of Civil Procedure makes consanguinity or affinity within the fourth degree, to any party to a cause, a ground of challenge. This provision has received, and should receive, a liberal construction. It is

not necessary that the party in interest should be in name a party to the litigation. It is sufficient if it be shown that he is immediately, directly, and beneficially interested in the result of the litigation. Thus it has been held a good ground of challenge where a juror is related to a stockholder in a corporation which is a party to the litigation (*Quinebaug Bank v. Leavens*, 20 Conn. 87¹; *Georgia R. R. Co. v. Hart*, 60 Ga. 550); or the one who may be called upon to pay a judgment which may be recovered (*Woodbridge v. Raymond, Kirby*, 279); and even to one interested in the principle involved in the pending action. (*Hartford Bank v. Hart*, 3 Day, 491.²) In this case the brother of the juror was directly interested in the litigation to the extent of ten per cent of the amount of the recovery, and the case comes fairly within the principle contemplated and meant to be covered by subdivision 2 of section 602 of the Code of Civil Procedure.

It was not error for the court to refuse to allow plaintiff's challenge to the juror Fales upon the ground of actual bias. Where the evidence adduced is such as plainly and clearly to show the bias of a juror, the action of the trial court in disallowing it is here reviewable. (*People v. Wells*, 100 Cal. 231; *People v. Scott*, 123 Cal. 434.)

But before the ruling of the trial court may be disturbed, the evidence should clearly show that the juror was not in fact impartial. "The case must be one in which it is manifest the law left nothing to the conscience or discretion of the court." (*Reynolds v. United States*, 98 U. S. 145.) Upon the examination of the juror Fales no such state of facts was established, and the ruling of the trial court will, therefore, not be disturbed.

The complaint in this action charged defendant with having engaged in the business of raising, grazing, and pasturing sheep in Mono county between the first day of June and the third day of July. The complaint was filed upon the third day of July. The court very properly limited the evidence to the actions of defendant in controlling and managing his sheep between the dates charged in the complaint. The plaintiff then sought leave to amend his complaint by

¹ 50 Am. Dec. 272.

² 3 Am. Dec. 274.

charging that defendant was engaged in the business of raising, grazing and pasturing sheep from the 1st of June to the 11th of July, "and for a long time thereafter." The court's refusal to allow this amendment is assigned as error; but under the circumstances of the case the ruling was the only proper one which the court could have made. Defendant was called upon to answer for his responsibility under the ordinance, upon a complaint filed upon July 3d, charging him with having engaged in the business of raising, grazing, and pasturing sheep within the month next immediately preceding. If, in fact, the defendant had so engaged in the business, his responsibility was complete, and he was liable for the license tax imposed by the ordinance; but, if in fact he had not so engaged in the business, as charged in the complaint, and at the time of the filing of the complaint, then this particular cause of action must fail. If it were true that defendant, though not engaged in the business up to July 3d, had after that date engaged in the business, no amendment to the original complaint could be permitted to charge upon a cause of action subsequently arising, when none in fact existed at the time of the filing of the complaint. The county would be compelled to submit to a judgment against it, and for any future violation of the terms of the ordinance commence its action anew. If the effort to amend here made was to show subsequent acts of raising, grazing, and pasturing, in addition to those which the defendant had done prior to July 3d, then the amendment was unnecessary. If by the amendment it was proposed to show that he had engaged in the business subsequent to July 3d, though not before that date, then it was wholly improper.

The order appealed from is therefore affirmed.

Temple, J., and McFarland, J., concurred.

[Sac. No. 678. Department Two.—September 21, 1900.]

CHARLES MOORE, Respondent, v. MARGARET A.
MOORE, Appellant.

TRUST—HOMESTEAD ENTRY—TITLE—FRAUD UPON GOVERNMENT—ILLEGAL CONTRACT.—A contract between a father, who was entitled to make a homestead entry, and his son, who, without the father's original knowledge or consent, had by fraud and perjury made an entry in his own name, that the son should thereafter proceed and make proofs, and obtain title from the government for the father's benefit, and then convey the same to the father, is illegal and void. An action by the father to enforce a trust in the title so acquired by the son, necessarily depending upon the enforcement of the illegal contract, cannot be maintained.

APPEAL from a judgment of the Superior Court of Lassen County. F. A. Kelley, Judge.

The facts are stated in the opinion of the court.

A. L. Shinn, and N. J. Barry, for Appellant.

The demurrer should have been sustained. Section 2290 of the Revised Statutes of the United States provides that every person who applies to make a homestead entry must make an affidavit that the entry is made for his exclusive use and benefit, and not either directly or indirectly for the use or benefit of any other person. Therefore the plaintiff comes into court claiming a title which he says was initiated in fraud and consummated by perjury, to which he admits he was a party. The mere statement of the proposition is enough to close the door against him. (*Mitchell v. Cline*, 84 Cal. 409; *Snow v. Kimmer*, 52 Cal. 624; *Huston v. Walker*, 47 Cal. 484; *Damrell v. Meyer*, 40 Cal. 166; *Beard v. Beard*, 65 Cal. 356; Civ. Code, sec. 1667.) Plaintiff used no means to perfect his own title, and cannot hold the patentee, as a trustee by implication of law. (*Dreyfus v. Badger*, 108 Cal. 63; *Sacramento Sav. Bank v. Hynes*, 50 Cal. 195; *Schieffery v. Tapia*, 68 Cal. 184.)

Spencer & Raker, and H. D. & G. H. Burroughs, for Respondent.

The entry being made without the consent or knowledge of the plaintiff, the plaintiff was not a party to the fraud. The son held the title as an involuntary trustee for the father. (Civ. Code, sec. 2224.) The land, being in the possession of the plaintiff, was not subject to pre-emption. (U. S. Rev. Stats., sec. 2289; *Davis v. Scott*, 56 Cal. 170; *Ather-ton v. Fowler*, 96 U. S. 519; *Rourke v. McNally*, 98 Cal. 292; *McGuire v. Brown*, 106 Cal. 670; *Wormouth v. Gardner*, 112 Cal. 510.) A trust arises by implication of law from the facts appearing. (Perry on Trusts, sec. 27; *Whittenbrock v. Cass*, 110 Cal. 5; *Reynolds v. Sumner*, 126 Ill. 58¹; *Bigley v. Jones*, 114 Pa. St. 510; *Brison v. Brison*, 75 Cal. 530²; *Hayne v. Hermann*, 97 Cal. 260; *Murphy v. Clayton*, 113 Cal. 153.)

HENSHAW, J.—The appeal is from the judgment. The prayer of the complaint is that defendant be decreed to hold the legal title to certain land in trust for plaintiff. The material allegations of the complaint are: That plaintiff was in the possession and occupation of public land of the United States, which land was subject to homestead entry. Plaintiff was qualified to enter the land under the homestead laws, and was entitled upon so doing, and after compliance with the laws of the United States, to obtain title thereto. His son, Charles W. Moore, lived with him upon the land. In 1873, without the knowledge or consent of plaintiff, the son made a homestead entry upon the land at the United States land office. The entry was fraudulently made while the plaintiff was in the exclusive possession of the land, and while the land was not open to homestead entry by any person other than the plaintiff. The son was guilty of fraud and false representations to the officers of the land office, and his entry was illegal and void. After the entry the plaintiff, learning of it, went to his son and demanded an explanation, stating to him that his entry was irregular and illegal, to which the son replied that he had made the entry for the protection and benefit of plaintiff, and to secure the land for plaintiff, and

¹ 9 Am. St. Rep. 523.

² 7 Am. St. Rep. 189.

to prevent any person other than the plaintiff from securing the same, and told plaintiff that if he would not object to or contest the entry he would secure the title to the lands from the United States for the use and benefit of plaintiff. The plaintiff relied upon the promises and statements so made to him by his son, and thereupon consented that his son should proceed under his entry, make proofs, and acquire title to himself. This the son did, and the patent of the United States for the land in question was in due course issued to him. The son died without fulfilling his promise, and this action was commenced in 1896 for the purpose above indicated. A general demurrer was interposed to the complaint, which was overruled.

That demurrer should have been sustained and the action dismissed. Section 2290 of the Revised Statutes of the United States provides that every person who applies for a homestead entry must make affidavit that the entry is made for his exclusive use and benefit, and not, either directly or indirectly, for the use and benefit of any other person. By the allegations of this complaint the son of plaintiff conceived and set in active operation a fraud upon the government of the United States, by which, through flagrant perjury, he undertook to acquire title to a part of the government domain. The plaintiff, knowing this, consented that the fraud should be consummated, upon the assurance that the title acquired should subsequently be conveyed to him. He seems to think that no one was interested in the scheme other than himself and his son, and that he may be heard to complain in a court of equity because a title thus fraudulently secured from the government by false representations and perjury, to which he was a consenting party, was not afterward conveyed to him. He forgets, however, the higher interests of the general government, and overlooks the dictates of public policy. That the agreement between the father and son was for the consummation of a fraudulent imposition upon the government there can be no doubt, and plaintiff's right of recovery under his pleading looks to the enforcement of this illegal contract. As was said by Judge Duncan in *Swan v. Scott*, 11 Serg. & R. 164: "The test whether a demand connected with an illegal transaction is

capable of being enforced is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot establish his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant." A consideration of contracts, illegal either because against the express mandate or the express policy of the law, was recently had by this court in *Berka v. Woodward*, 125 Cal. 119,³ to which reference may be made.

The judgment appealed from is reversed, with directions to the trial court to sustain the demurrer and dismiss the action.

Temple, J., and McFarland, J., concurred.

[L. A. No. 483. In Bank.—September 21, 1900.]

AMELIA B. BAKER et al., Respondents, v. SOUTHERN CALIFORNIA RAILWAY COMPANY, Appellant.

APPEAL—REVERSAL OF JUDGMENT—DIRECTION FOR COSTS—REMITTITUR—LACHES.—Where a judgment of the superior court is reversed on appeal, without the insertion in the order of any direction as to costs, it is the duty of the clerk of the supreme court, under rule XXIII of that court, to enter upon the record a judgment that appellant recover his costs of appeal, and to insert such direction in the *remittitur*. If the clerk enters the judgment correctly, but omits to insert such direction in the *remittitur*, the appellant is entitled to have the *remittitur* recalled, and a proper one issued, and it is not laches to delay the application therefor to the next term of the supreme court in the district in which the appeal was heard.

ID.—ATTEMPT TO COLLECT COSTS.—The fact that the appellant made two unsuccessful attempts to collect his costs under two imperfect *remittiturs* issued by the clerk is no objection to the application.

ID.—APPLICATION TO RECALL REMITTITUR—GROUND OF MOTION.—An objection to the application on the ground that the notice of the motion did not specifically state that it would be made on the ground

that the *remittitur* failed to conform to the judgment will not be sustained, where the terms of the notice otherwise disclose that this was the ground of the motion, and the opposite side was not prejudiced by the omission.

APPLICATION to recall and correct a *remittitur* originally issued herein.

The facts are stated in the opinion of the court.

C. N. Sterry, and Henry J. Stevens, for Appellant.

Withington & Carter, for Respondents.

BEATTY, C. J.—This is a motion to recall and correct the *remittitur* originally issued herein.

The judgment of the superior court was reversed October 31, 1899, without inserting in the order any direction as to costs (126 Cal. 516), and under rule XXIII of this court it became the duty of the clerk to enter upon the record a judgment that appellant recover its costs of appeal, and to insert this direction in the *remittitur*. The clerk entered the judgment correctly, but omitted to insert the proper direction in the *remittitur*, and when the appellant filed its cost bill the superior court, on motion of respondents, struck it out. Subsequently, the clerk of this court, without any order so to do, sent down another *remittitur* containing a proper direction as to costs, but omitting a copy of the opinion, whereupon appellant filed a second cost bill, which also was stricken out by the superior court on motion of respondents. Thereupon this motion was made at the ensuing Los Angeles term.

Respondents oppose the motion upon various technical grounds. In the first place they say the notice of motion does not state the grounds upon which it will be based. It is true that the notice does not expressly state that it will be made upon the ground that the *remittitur* does not conform to the judgment, but the terms of the notice clearly disclose that this is the ground of the motion, and, in the absence of a law or rule of court requiring an explicit statement of the grounds of a motion, we would not deny a proper measure of relief merely because of a failure to set out the grounds of the motion, unless it appeared that such omission had preju-

dicted the opposite side—and no such prejudice was possible in this case. Nor was it laches to delay moving until the next Los Angeles term. The case belongs in that district, and the interest and convenience of the parties was promoted by a hearing at that city, while no possible injury to respondents could result from the delay. The showing in support of the motion was sufficient. There was a certified copy of the *remittitur* sent down, and, as we take notice of our own judgment in the case, the defect in the *remittitur* was made apparent. There was no want of jurisdiction to make our *remittitur* conform to our judgment. This case does not fall under the rule that a *remittitur* will only be recalled when fraud or imposition has been practiced upon the court. That rule is applied where the object of recalling the *remittitur* is to reinvest the court with jurisdiction of the cause, in order that it may revoke or revise its judgment or order. Here the whole purpose of the motion is to make the *remittitur* conform to the final judgment of the court, and it is based upon the proposition that by a clerical omission no proper *remittitur* has ever been issued. Finally, it is no objection to this motion that the appellant made two unsuccessful attempts to collect its costs under the two imperfect *remittiturs* heretofore issued.

It is ordered that the *remittitur* heretofore issued be recalled, and a correct *remittitur* issued in its place, containing the proper direction as to costs.

Henshaw, J., Temple, J., McFarland, J., Harrison, J., and Garoutte, J., concurred.

[S. F. No. 1537. Department One.—September 27, 1900.]

GRAND GROVE OF UNITED ANCIENT ORDER OF DRUIDS OF CALIFORNIA, Respondent, v. GARIBALDI GROVE NO. 71, etc., and JOHN KNARSTON, Respondents, and C. DUCHEIN, Treasurer of Said Grove, Appellant.

ORDER OF DRUIDS—FORFEITED CHARTER OF SUBORDINATE GROVE—ACTION BY GRAND GROVE AGAINST TREASURER—PARTIES.—In an action by an incorporated grand grove of the United Ancient Order of Druids to compel the treasurer of a subordinate unincorporated grove which it is alleged had been declared dissolved, and its charter and all of its property forfeited to the grand grove, the alleged defunct grove is not a proper party defendant; but the individuals named as defendants should be regarded as the only defendants.

ID.—UNINCORPORATED BENEFIT SOCIETY—RIGHTS OF MEMBERS—EXPULSION—CHARGE AND NOTICE OF HEARING.—An unincorporated association organized for mutual benefit is a mere aggregate of individuals, called for convenience, like partnerships, by a common name. Its members own its property, and it has no right of expulsion except that based upon the agreement of the members embodied in its charter, constitution, and by-laws. No member can be deprived of his share in the property by expulsion without a specific charge of the violation of particular rules of the association creating the offense charged, and prescribing expulsion as a penalty, and without notice and hearing of such charge.

ID.—FORFEITURE OF CHARTER—PRINCIPLES INVOLVED—MODE OF NOTICE OF CHARGE AND HEARING.—The same principles which are applicable to the expulsion of a member are applicable to the expulsion of the subordinate association and its members, and the forfeiture of its charter and property by a superior association. If there is no provision in the charter, constitution, or bylaws of the association prescribing vicarious service of notice of the charge and hearing thereof upon its officers or designated agents, jurisdiction to forfeit the charter can only be acquired by personal service of such notice upon the members of the subordinate association.

ID.—CITATION TO FORMER OFFICERS—STIPULATION FOR HEARING—JURISDICTION—DE FACTO SUCCESSORS—DUE PROCESS OF LAW.—The service of a citation to the accused subordinate grove upon its former officers, whose term had expired eight months previously, and who did no other act after abdicating their offices than to acknowledge

service of such citation and stipulate for a hearing of the charge, after their places had been filled by the election of other officers, who were acting as such, could not confer jurisdiction upon the grand grove to forfeit the charter, irrespective of the validity of the election. Such forfeiture would be without due process of law as to the members claiming to be the grove, who were represented by *de facto* officers of their choice, to whom no notice of hearing was given.

ID.—REPRESENTATION BEFORE TRIAL COMMITTEE—FINDING—JURISDICTION NOT SHOWN.—A finding that a person named appeared before the trial committee of the grand grove on the part of the defendants, comprising only two of the members of the subordinate grove, under authority given alone by the treasurer defendant, whose authority to bind the members of the subordinate grove does not appear, does not show jurisdiction in the grand grove to forfeit the charter of the subordinate grove.

ID.—REQUEST FOR NEW COMMITTEE—MISTAKE OF NAME IN RECORD—CORRECTION.—Where it is not denied that there is a mistake in the record in substituting the name of the treasurer defendant for that of an attorney of the defunct association, who appeared in the grand grove and urged the appointment of a new committee, the appellate court will not rest its decision upon the false statement in the record which might be corrected upon admission of the respondent, or upon order to the court below, or upon motion in that court.

ID.—JURISDICTION OF GRAND GROVE OVER SUBJECT MATTER—INSUFFICIENT CHARGES.—Where the charges in the written accusation of the grand grove against the subordinate grove consisted: 1. Of a mere general charge that the offending grove had violated its charter, and had refused to obey the directions and laws of the grand grove; and 2. Of charges of specific acts not appearing in the accusation to be violations of any of the specific provisions of the charter, constitution, and bylaws, or to be acts of the subordinate grove as distinguished from acts of its members—no jurisdiction is shown over the subject matter of any offense which could justify a forfeiture of the charter.

ID.—FORFEITURE WITHOUT DUE PROCESS OF LAW.—A forfeiture of the charter and property of the subordinate grove by the grand grove, without sufficient specification of charges to show jurisdiction over the subject matter, and without sufficient notice of hearing to bind the members of the subordinate grove, is in violation of the constitutional provision that no one shall be deprived of property without due process of law.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion.

Fitzgerald & Abbott, for Appellant.

A. B. Hunt, for Grand Grove, Respondent.

Louis F. Dunand, for Garibaldi Grove, and John H. Knarston, Respondents.

SMITH, C.— Appeal from judgment for plaintiff against defendant Duchein, and from order denying motion for new trial.

The plaintiff is a corporation organized under the laws of this state. The defendant, the Garibalid Grove, was, on and before June 22, 1893, a subordinate unincorporated association, organized under charter from the plaintiff; but on that date, by a vote of the Grand Grove, at the annual session held in San Francisco for the year 1893, a resolution was passed whereby the Garibaldi Grove was declared "dissolved, and the charter and all property of said Garibaldi Grove forfeited to the Grand Grove," etc. At that date the defendant Duchein was the treasurer of the Garibaldi Grove, and as such had in his custody the sum of nine hundred and fifty-four dollars and fifteen cents, the property of the grove; and the suit was brought May 21, 1895, to recover judgment against him for this money.

No relief was demanded or given against the defendant association. Nor is it explained why it was desirable or how it was possible to make an association, which, according to the allegations of the complaint, had been dissolved, a party to the suit. Yet this defunct association is not only made a party, but appears as though living, and files an answer in the lower court praying for judgment in favor of the plaintiff—thus presenting the case of a deceased party coming into court to participate in a contest as to the disposition of its estate, and at the same time asking an adjudication of its own decease. The error, however, though grotesque, is immaterial, and is referred to simply for the purpose of clearing the case of an unnecessary complication. The suit is merely a suit against the defendants Duchein and Knarston, who are to be regarded as the only defendants.

The sole question in the case is as to the validity of the resolution of the Grand Grove declaring a dissolution of the Garibaldi Grove and a forfeiture of its property to itself. If that was valid the plaintiff was entitled to recover from Duchein the amount held by him as treasurer at the time of the dissolution; otherwise not.

It is indeed claimed by Duchein that between the date of the alleged dissolution and March 23, 1895, he paid out as treasurer, and under the direction of the Garibaldi Grove (for lawyers' fees and cost in previous suit—reported in *Grand Grove etc. v. Garibaldi Grove etc.*, 105 Cal. 219), the sum of seven hundred and eighty-one dollars, and on that date turned the balance over to his successor; and it is submitted by his counsel "that Mr. Duchein ought not to be compelled to pay these amounts twice." But if the dissolution of the grove and the forfeiture of its property to the Grand Grove be valid, such must be the result.

The principles of law governing the decision of the question involved, may be thus summarized: "There is no distinction in principle between expelling a member from a subordinate grove and revoking the charter of the grove itself." (*Grand Grove etc. v. Garibaldi Grove etc.*, *supra.*)

Associations of this character are not bodies politic or corporations; nor are they recognized by the law as persons. They are mere aggregates of individuals called for convenience, like partnerships, by a common name. Such associations cannot, therefore, acquire or hold property, though often said to do so. All the property said to belong to it is in fact the property of its members and each man's share of it is his own private property and equally protected by the fundamental laws. (1 Bacon on Benefit Societies, sec. 27.) For the same reason such associations cannot sue or be sued. In suits where they are apparently parties, the real parties are the members of the association, who—as in the case of partnerships—are sued by the company name.

Associations of this kind are not vested with the right of expulsion by the general law of the land, but by the agreement of the members as expressed in the charter, constitution, and by-laws of the association. To these and to legis-

lation subsequently to be enacted, every member assents in joining the association. (1 Bacon on Benefit Societies, secs. 64, 81.) There thus arises a special law resting on the agreement of the members and binding on them; and in this, and not in the general law, is to be found the source of the power of expulsion. Hence it is said: "The rights of the members of these associations rest in contract, and....can only be divested in the manner provided in the contract." (1 Bacon on Benefit Societies, sec. 104.)

It follows—unless in the case of conduct subversive of the fundamental objects of the association, with which in this case we have no concern—that no member can be expelled, and thus deprived of his share of the property of the association, unless for violation of some explicit provision of the law of the associating creating the offense with which he is charged, and prescribing expulsion as the penalty. (*Otto v. Journeymen Tailors' etc. Union*, 75 Cal. 314.¹) To justify expulsion there must, therefore, be a written charge, in the nature of an indicament or information referring, either expressly or by implication, to the particular provision of the law violated and describing some specific act or acts as constituting the offense. (*Grand Grove etc. v. Garibaldi Grove etc.*, *supra*; 1 Bacon on Benefit Societies, sec. 103; Hirschl's Law of Fraternities, sec. 13, p. 13.)

The party accused must also have due notice of the trial of the charge, and an opportunity of being heard in his defense (*Grand Grove etc. v. Garibaldi Grove etc.*, *supra*); and "if no other method of notice is prescribed by the by-laws, it must be served personally" (1 Bacon on Benefit Societies, sec. 101)—i. e., where the proceeding is against the association—on the members, for they alone are the parties to the suit. They may, however, where the constitution or by-laws of the association so provide, be served vicariously by notice on certain officers or agents designated by them for the purpose. But service of this kind is good only by virtue of the agreement of the members as thus expressed, and would otherwise be void.

The above rules apply not only to the action of a subordinate association in expelling a member, but, *a fortiori*, to a

¹ 7 Am. St. Rep. 156.

superior association that assumes to exercise the power of expulsion over the subordinate association or its members. (1 Bacon on Benefit Societies, secs. 104, 116, subd. 4.) In either case, in a proceeding for expulsion, the society exercising the power acts in a *quasi* judicial character and must confine itself to the powers vested in it (*Otto v. Journeymen Tailors' etc. Union, supra*); and, as in all cases of inferior tribunals, its jurisdiction must affirmatively appear.

Applying these principles to the present case, it is manifest that the proceedings against the Garibaldi Grove were without jurisdiction, either of the subject matter, or of the parties, and were therefore wholly void.

1. The claim of jurisdiction over the person of the accused association, or rather over the persons of its members, must rest on the written acknowledgment of service of the citation, appearing in the record, signed "C. Clivio, Last Noble Arch," "J. Moresi, Last Secretary." The terms of these gentlemen had expired some eight months prior to the date of the alleged service; and even before the expiration of their terms they had ceased to attend the meetings of the grove and had avowedly withdrawn from exercising their official functions—the signing of the acknowledgment being, in fact, their first official act subsequent to their abdication of their offices. In the meanwhile, other officers had been elected by those members of the grove who continued to hold meetings; and these officers, at the time of the alleged service, were claiming to be, and were acting as, the official representatives of the grove. Their elections, it is indeed claimed, were irregular and void. But it cannot be determined from the record whether this was so, or the contrary; and on this point the burden of proof was on the plaintiff. But however this may be, the fact is indisputable that at the time of the proceeding, there was a *de facto* association, consisting of members of the grove, claiming to be the grove, and represented by its *de facto* officers. And under these circumstances it was not consistent with good faith for the Grand Grove to serve Clivio and Moresi as representatives of the Garibaldi Grove and its members, or for them to acknowledge service, and to stipulate for immediate trial, on their behalf. For the effect of thus pro-

ceeding was to deprive the members of the grove in opposition, and claimed to be recalcitrant, of the opportunity to be heard, and thus to deprive them of their shares of the property of the association without due process of law. And such, manifestly, was the purpose of the proceeding.

But apart from these considerations, and assuming that Clivio and Moresi were the officers of the association, there was no evidence of any provision of the charter, constitution, or by-laws of the association prescribing vicarious service on them or authorizing them to accept service. Hence jurisdiction could be acquired only by personal service on the members (1 Bacon on Benefit Societies, sec. 101); and there is no pretense of such service.

Much stress, however, is laid on the finding of the court that Mr. Lovie "appeared before [the trial] committee on the part of said defendants," and it is claimed that jurisdiction was thus acquired. But the finding refers only to the defendants in this action, and cannot be construed as referring to any other members of the association. And it also appears from the finding that the only authority exercised or claimed by Mr. Lovie was the authority given him by Duchein; whose authority does not appear.

In this connection it will be proper to refer to a controversy as to the record between the attorneys of the respective parties. It is claimed by respondent's counsel that the trial committee was appointed on the motion of Mr. Duchein; and in support of this contention there is quoted in his brief the following passage from the statement: "The next day Mr. Duchein came into the session of the Grand Grove and urged the appointment of a new committee," etc. On the other hand, it is claim by appellant's counsel that in the reporter's transcript of the testimony the name of "Dunand" (who appears in this case as the attorney of the defunct association) was written, and the name of "Duchein" was inadvertently substituted for his in the statement; and in support of this claim the certificate of the court below to that effect is filed in his court. Nor is the fact disputed by the respondent's attorney, who simply claims that the defendant Duchein cannot be allowed to impeach his own record. But the

counsel is mistaken in supposing that it would be to trifle with the law, or to insult the intelligence of the court to argue the point. The method of bringing the error to the attention of the court was irregular, but the court would be unwilling to rest its decision upon an alleged fact known to it, and apparently to the counsel on both sides, to be false. Nor are the resources of the law so defective as to require it to do so. The fault in the record could readily be cured by the admission of the respondent's attorney; and the duty of making such admission was imposed upon him by the provisions of section 282 of the Code of Civil Procedure, and especially by those of subdivisions 3 and 4. Or, failing such admission, the record could be amended in the court below; and such amendment, if the fact were material, would be directed by this court.

2. With reference to the jurisdiction of the Grand Grove over the subject matter of the proceeding, the case is no better. The charges against the Garibaldi Grove, as they appear in the written accusation, are of two kinds—the one consisting of the general charge that the offending grove “had violated the terms of its charter,” and “had refused to obey the directions and laws of the Grand Grove,” etc.; the other, of charges of specific acts that do not appear to be violations of any of the provisions of the charter, or of the constitution or by-laws of the Grand Grove, or even to be acts of the Garibaldi Grove, as distinguished from the acts of its members. There was, therefore, no offense charged against the accused association, or at least no offense justifying forfeiture. And the findings of the trial committee are equally defective.

On both grounds, therefore, the case comes clearly under the constitutional provision that no one “shall be deprived of . . . property without due process of law.” (Const., art. I, sec. 13; U. S. Const., art. XIV, sec. 1.)

I advise that the judgment and order denying a new trial be reversed and the cause remanded, with directions to the court below to sustain the demurrer to the complaint.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed and the cause remanded, with directions to the court below to sustain the demurrer to the complaint.

Temple, J., Harrison, J., Garoutte, J.

Hearing in Bank denied.

[Sac. No. 615. Department Two.—September 27, 1900.]

COUNTY OF SUTTER, Respondent, v. MARY J. McGRUFF et al., Appellants.

ACTION BY COUNTY—PLEADING—STYLE OF NAME—CERTAINTY.—An action by a county is properly brought by styling the name of the plaintiff as "The county of" the name specified; and the complaint is not subject to a demurrer for uncertainty in so styling the county plaintiff.

ID.—CAUSES OF ACTION NOT SEPARATELY STATED—DEMURRER—MOTION.—That several causes of action are not separately stated in the complaint is not ground of demurrer, but the objection should be taken advantage of by motion that they be severed and separately pleaded.

ID.—SUFFICIENCY OF FINDING—REFERENCE TO COMPLAINT.—A finding that all of the allegations of the complaint are true is a sufficient finding upon the issues raised thereupon.

ID.—ACTION TO CONDEMN LANDS FOR HIGHWAY—EVIDENCE—PRIMA FACIE CASE—OATH OF VIEWERS—BURDEN OF PROOF.—In an action by a county to condemn lands for a public highway, if a *prima facie* case is made by the requisite evidence in proper form, it is not incumbent upon the county in the first instance to prove that the viewers took the required oath for the faithful discharge of their duties, but the burden is upon the defendant to disprove it.

ID.—ORDER SETTING APART DAMAGES ASSESSED—DESIGNATION OF FUND. An order by the supervisors that the amount of damages assessed and awarded be set apart in the treasury of the county "out of the proper fund," to be paid in accordance with the law, is sufficient. It need not specify the particular fund from which the moneys were to be drawn.

ID.—COMPLIANCE WITH ORDER—PROOF ESSENTIAL—PRESUMPTION.—The county must prove compliance with the order of the supervisors by the treasurer, and that the moneys awarded as damages were in fact sequestered in the treasury, and were available for compensating the owners of the land; and the absence of such proof cannot be supplied by a presumption that official duty was regularly performed.

ID.—TENDER OF COMPENSATION—COMPLIANCE WITH LAW—FAILURE OF PROOF.—The requisites of the tender of compensation prescribed by the law must be strictly complied with; and in the absence of proof of compliance by the treasurer with the order of the supervisors it must be held that the county failed to make its tender and to keep it good.

APPEAL from an order of the Superior Court of Sutter County denying a new trial. E. A. Davis, Judge.

The facts are stated in the opinion of the court.

Forbes & Dinsmore, and K. S. Mahon, for Appellants.

A. C. McLaughlin, and M. E. Sanborn, for Respondent.

HENSHAW, J.—This action was brought by the county of Sutter to condemn certain lands for a public highway, after statutory proceedings had before the board of supervisors. The cause was tried without a jury, judgment passed for plaintiff, and from the order denying them a new trial defendants appeal.

Most of the propositions which they present in support of their appeal may be briefly disposed of.

1. The demurrer to the complaint for uncertainty and unintelligibility was properly overruled. This demurrer was based upon the ground that the complaint charges in the name of "The county of Sutter," when there is no political subdivision of the state bearing such designation, and the true and only name of the county is "Sutter." But as article VI, section 6, of the constitution of the state names "The counties of Yuba and Sutter," and as certificates of acknowledgment under section 1189 of the Civil Code are expressly required to state the venue, as "state of ———, county of ———," it would seem that this contention does not even merit the notice which has thus been given it.

2. That the causes of action were not separately stated in the complaint was not ground of demurrer, but should have been taken advantage of by motion to sever and separately plead them. (*Fraser v. Oakdale Lumber etc. Co.*, 73 Cal. 188; *Bernero v. South British and Nat. Ins. Co.*, 65 Cal. 386; *City Carpet etc. Works v. Jones*, 102 Cal. 506, 510.)

3. The court found that all of the allegations of the complaint were true. This was a sufficient finding upon the issues. (*Moore v. Clear Lake Water Works*, 68 Cal. 146.)

4. The description of the land sought to be condemned, set forth in the complaint and in the findings of the court, was sufficiently explicit.

5. In *County of Siskiyou v. Gamlich*, 110 Cal. 94, the rule of evidence governing cases such as this is laid down. This rule is repeated with approval in *County of Sonoma v. Crozier*, 118 Cal. 680. It is there said: "To make out a *prima facie* case, it was only incumbent upon the plaintiff to prove the presentation of a regular petition to the board of supervisors, with a good and sufficient bond, the record of the board showing the appointment of viewers, the report of the viewers in proper form, and its approval, the assessment of damages, and the setting apart out of the proper fund of the money awarded to the defendant, his refusal for ten days to accept the same, and the order to commence the suit for condemnation." Under this rule, if the requisite evidence in proper form is presented, a *prima facie* case for condemnation is established, and it is incumbent upon the defendant to disprove, and not upon the plaintiff in the first instance to prove, that the viewers in fact took the required oath for the faithful discharge of their duties.

6. In the case at bar, there were shown the presentation of a regular petition to the board of supervisors, with a good and sufficient bond, the record of the board showing the appointment of viewers, the report of the viewers in proper form, and its approval by the board, and the assessment of damages. Proof was made that the board of supervisors ordered that the amount of damages assessed and awarded be set apart in the treasury of the county "out of the proper fund," to be paid in accordance with the law. This order was sufficient. It was not incumbent upon the supervisors in

making their order to specify the particular fund from which the moneys were to be drawn. (*Babcock v. Goodrich*, 47 Cal. 488, 509; *White v. Hayden*, 126 Cal. 621.)

7. The evidence of the plaintiff wholly failed to show any compliance with the order of the board. It failed to show whether the moneys awarded as damages were, in fact, sequestered in the treasury, or whether there were any moneys available for the purpose of compensating the owners of the land. This absence of proof is admitted by respondent, but it is said that, under the presumption that official duty has been regularly performed, it will be presumed that the treasurer did, in fact, set aside from the proper funds the requisite amount of moneys under the order of the board of supervisors. But the presumption as to the performance of official duty cannot save this point, for the following reason: The statutory provisions relative to this matter provide a special form of tender which must be made to the land owner before suit in condemnation may be begun. It is essential, since the law has prescribed it, that the requisites of such tender shall be strictly complied with. In effecting the tender it is required that the amount of money shall be absolutely set apart in the treasury and held for the full period of ten days, subject to the demand of the rightful owner of the land. Unless this is done, and is shown to have been done, the county's right of action does not arise, since the statute has seen fit to make this tender a prerequisite to that right. Indulging, then, to its fullest extent, the presumption as to the performance of official duty, it may be presumed that the treasurer did all that was in his power to comply with the order of the board of supervisors; but no presumption can be indulged in to the effect that at the time of the order there was actually money in the proper fund sufficient and available for the indicated purposes. In the absence of this proof it must be held that the county failed to comply with the law in making its tender and keeping it good.

And for this reason the order appealed from, must be reversed and the cause remanded.

Temple, J., and McFarland, J., concurred.

[L. A. No. 639. Department Two.—September 27, 1900.]

ESCONDIDO HIGH SCHOOL DISTRICT OF SAN
DIEGO COUNTY, Respondent, v. ESCONDIDO SEM-
INARY OF UNIVERSITY OF SOUTHERN CALI-
FORNIA et al., Appellants.

IRRIGATION ACT—TAX DEED—VALIDITY OF ASSESSMENT—MISNOMER.—

Under section 32 of the irrigation act of 1887, providing that “when land is sold for assessments correctly imposed, as the property of a particular person, no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof affects the sale or renders it void or voidable,” an assessment made by an irrigation district to the “Escondido Seminary,” instead of the “regents of the Escondido Seminary,” is not invalid, and cannot vitiate a tax deed made thereunder.

ID.—CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—Section 32 of the irrigation act is not unconstitutional, as being special legislation, but is a general law, applying equally to all persons embraced in a class founded upon a proper distinction.

ID.—TAX DEED AS EVIDENCE—CONSTITUTIONAL QUESTION—CONSTRUCTION OF STATUTE.—The question as to the constitutionality of subdivision 7 of section 30 of the irrigation act of 1887, making the tax deed conclusive evidence of the regularity of all the proceedings from the assessment to the deed, is independent of the prior provisions of the section making the deed *prima facie* evidence of seven specially enumerated facts, corresponding to those enumerated in section 3786 of the Political Code; though it seems that the subdivision may be reasonably construed as referring to proceedings other than those as to which the deed is made *prima facie* evidence, so as to relieve it from constitutional objection.

ID.—ASSESSMENT TO PAY ANNUAL INTEREST—DISCRETION OF DIRECTORS.—Section 22 of the irrigation act, providing that “the board of directors shall levy an assessment sufficient to raise the annual interest on the outstanding bonds,” does not confine their power of assessment to the exact amount of the interest, but allows them a reasonable discretion in the matter.

ID.—PROLONGED EFFORT IN COLLECTION—SLIGHT EXCESS—VALIDITY OF TAX DEED.—The collection, after prolonged effort for four years, of a sum a few hundred dollars in excess of fifteen thousand dollars required to be raised by an assessment to pay the annual interest, does not show an abuse of discretion of the directors in levying the assessment, and cannot render invalid a tax deed based upon the assessment.

Id.—RECITAL IN DEED OF CERTIFICATE OF SALE—APPEAL—DEFECTIVE RECORD—PRESUMPTION.—If the tax deed is not printed in the record upon appeal, it must be presumed in favor of the judgment that the deed correctly recited the certificate of sale as required under the act of 1887; and a claim that the tax deed offered in evidence is void for failure to make such recital cannot be sustained. The appellants must affirmatively make error to appear.

APPEAL from a judgment of the Superior Court of San Diego County and from an order denying a new trial. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

Parrish & Mossholder, and Cochran & Williams, for Appellants.

F. P. Willard, and Withington & Carter, for Respondent.

THE COURT.—Action to quiet title to block 340 in the city of Escondido, San Diego county. Plaintiff had judgment, from which and from the order denying motion for new trial this appeal is prosecuted. There are numerous defendants, but the appeal is by the regents of the Escondido Seminary and by the University of Southern California only.

Plaintiff and defendants (regents) claim title through a common source, to wit, Escondido Land and Town Company, whose former ownership all parties concede. Defendants' deed from this company is dated September 18, 1886, and the plaintiff's deed is dated February 20, 1897, by quitclaim. Plaintiff also claims under a tax deed by the collector of the Escondido Irrigation District in said county, to H. W. Putnam, dated March 3, 1896, for an assessment made in 1894. Putnam conveyed the premises to plaintiff by deed dated January 8, 1897.

Plaintiff offered in evidence the tax deed between William Becker, collector of the Escondido Irrigation District, first party, and H. W. Putnam, second party, purporting to convey block 340 in question. The entire deed is not in the record, but the following recital from it appears: "That said property was assessed in the year A. D. 1894, for the year 1894, at \$11,200, to the Escondido Seminary," by the assessor

of said district and a tax levied thereon in 1894, by the directors of the district, "for the purpose of raising money to pay the annual interest for the year 1894 on the outstanding bonds of said irrigation district; that said tax was not paid, and that on the twenty-first day of February, 1895, said collector sold said property for said unpaid tax to said Putnam, which deed was signed by William Becker, collector of the Escondido Irrigation District." Defendants objected to the admission of the deed on the ground that it was incompetent and immaterial for the reason that there was no evidence that certain enumerated provisions of the act of March 7, 1887 (Stats. 1887, p. 29), had been complied with. These requirements are found in sections 20, 24, 25, 27, and 28 of the act and relate to the various steps to be taken in levying and collecting assessments, publication of delinquent lists, duty of the collector to do certain things before issuing any certificate of sale, etc. Section 30 provides that: "The matter recited in the certificate of sale must be recited in the deed, and such deed duly acknowledged or proved is *prima facie* evidence" (then follow seven paragraphs setting forth certain facts as to which the deed is *prima facie* evidence); "7. . . . such deed . . . is . . . conclusive evidence of the regularity of all the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed. The deed conveys to the grantee the absolute title to the lands described therein free from all encumbrances," etc. The court properly overruled defendants' objection, holding that as to these seven requirements the deed is *prima facie* evidence of the matters referred to therein, and not conclusive. Defendants introduced certain evidence as to the assessment by the district. The collector and assessor of the district produced the original assessment-book and rolls of the Escondido Irrigation District for the year 1894, and especially that part of said assessment-roll which reads as follows: "Name of person to whom the property is assessed, 1894, Escondido Seminary, block 340. Improvements thereon, brick building. Value without the improvements, \$1,200. Value of improvements, \$10,000. Total value of the property after equalization by the board of directors, \$11,200. Assessment for bond fund, \$311,36. Special assessment for purpose of

paying expense of organization, including salaries of officers and employees \$82.88. Situated in the city of Escondido, state of California." This evidence was offered and admitted for the purpose of showing that the property was not assessed to the party in whose name it stood of record at date of assessment.

It was also proved that the annual interest to be raised on the bonded debt of the district was \$15,000 and no more, and that the assessment levied for that year was in excess of that amount by about \$300, and that at the date of the trial the amount received by the treasurer from said tax levy was \$15,535.07, "exclusive of costs, charges, percentages and penalties."

1. Appellants claim that the tax deed is void because the property was assessed to the Escondido Seminary instead of the regents of the Escondido Seminary as they claim the title then stood.

Section 18 of the act (Stats. 1887, p. 37) provides as follows: "The assessor must . . . assess all real property in the district to the persons who own, claim, have the possession or control thereof, at its full cash value. He must prepare an assessment-book, with appropriate headings, in which must be listed all such property within the district, in which must be specified, in separate columns, under the appropriate head: 1. The name of the person to whom the property is assessed. If the name is not known to the assessor, the property shall be assessed to 'unknown owners.'"

Section 32 of the act is as follows: "When land is sold for assessments correctly imposed, as the property of a particular person, no misnomer of the owner or supposed owner, or other mistake relating to the ownership thereof, affects the sale or renders it void or voidable."

Appellants cite certain cases, decided by this court, holding that the assessment must be made either to the owner or unknown owners. But the cases cited and so holding, so far as we can discover, were commenced either prior to the amendment of 1880, found in section 3628 of the Political Code, or involved tax titles originating in an assessment made prior thereto. **The amendment was:** "But no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid."

It was held in *Lake County v. Sulphur etc. Min. Co.*, 66 Cal. 19, where the question arose upon an assessment made after the amendment, that "the ascertainment of the name of the owner is a matter with respect to which the assessor has discretionary power, and his judgment or conclusion in regard to it is final, so far as the validity of the tax is concerned." Again: "It is not a defense to the payment of the taxes upon the real estate that the assessor mistook the name of the owner of it." In *Landregan v. Peppin*, 86 Cal. 122, the owner of the land was William Minto and the assessment was to William Minto & Co., and it was held that the assessment was binding upon the property and the tax deed made under it was valid. (Citing *Lake County v. Sulphur etc. Min. Co.*, *supra*.) This latter case was referred to in *Pearson v. Creed*, 69 Cal. 538, and in *Emeric v. Alvarado*, 90 Cal. 444, and although the point now before us did not arise in those cases, the Lake county case seems to have been assumed to state the law correctly. Cases arising in states where a statute similar to that in this state and holding as has been held here, are cited in notes to section 277 of Blackwell on Tax Titles. (See, also, Black on Tax Titles, sec. 131.)

According to the evidence in the present case, as it stood when the levy was made under which the tax deed was executed to Putnam, the title to block 340 was in the Escondido Land and Town Company. The deeds offered in evidence by defendants showed a conveyance by the land company, by trust deed, to certain trustees, in trust, and later a conveyance by these trustees to the regents of the Escondido Seminary. It is immaterial, so far as the question now under consideration is concerned, who was the owner as shown by the record. The assessment was not invalid because made to the "Escondido Seminary" instead of the "regents of the Escondido Seminary."

2. Appellants contend that subdivision 7, section 30, of the act of 1887, *supra*, which makes the tax deed "conclusive evidence of the regularity of all the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed," is unconstitutional. This section of the act is substantially the same as sections 3786 and 3787 of the Political Code, relating to general taxation, and the first seven enumerated facts of which the deed shall be *prima facie* evidence

are copies of the like provisions in section 3786, *supra*. Part of the seventh paragraph of the act of 1887 contains substantially the provision of section 3787, *supra*, except that the word "other" immediately preceding the word "proceedings" in the code is omitted from the act of 1887; the code reads "all other proceedings," while the Wright act reads "all the proceedings."

It was held here in *Rollins v. Wright*, 93 Cal. 395, that there was no valid objection to the code provisions for reasons very clearly pointed out by Mr. Justice Temple in the opinion. If it were necessary to pass upon the question in this case, it might, consistently with recognized rules of construction, be held that the language used in the act of 1887 means all the proceedings other than those as to which the deed is made *prima facie* evidence, and the act would thus be relieved from the constitutional objection in support of which appellants cite copious authorities. But it is not necessary to decide the question, since the deed was *prima facie* evidence of the facts enumerated in section 30 of the act (*Cooper v. Miller*, 113 Cal. 238); and no evidence was offered by defendants to overcome this *prima facie* showing, except in the particular already noticed that the property was not assessed to the owner, and in the one other particular next to be considered.

3. Appellants claim that the assessment was in excess of the requirements for which it was made, and was, therefore, invalid. The assessment was made in 1894 for the purpose of raising \$15,000, and no more, to pay the annual interest on the outstanding bonds of the Escondido Irrigation District. The evidence showed "that at the date of the trial of this action there had been collected by the collector, and received by the treasurer of said irrigation district, the sum of \$15,335.07 of the said tax itself levied in the year 1894, as aforesaid, by said irrigation district, exclusive of costs, charges, percentages, and penalties."

Section 22 of the Wright act provides: "The board of directors shall levy an assessment sufficient to raise the annual interest on the outstanding bonds," etc. In *Hughson v. Crane*, 115 Cal. 404, it was said: "The phrase 'sufficient to raise' the annual interest is more elastic than would be the phrase 'to the amount of' the annual interest, and must be

held to authorize the board of directors to exercise a reasonable discretion in determining the amount to be levied"; and the opinion states the reasons why it must have been "in the mind of the legislature that the assessment might, in some instances, be not fully paid," which reasons justify the conclusion "that it was not intended that the assessment should be the exact amount of the interest." After four years' effort, it seems the district has been able to collect \$335.07 in excess of the amount required. There is no evidence beyond this fact that the levy will ever produce any more. We see no abuse of discretion on the part of the directors in this showing.

4. Appellants make the point that under the provisions of section 30 of the act of 1887 "the matter recited in the certificate of sale must be recited in the deed," and also that section 27 provides that the certificate shall state the amount paid by the purchaser for the property sold, and shall specify the time when the purchaser will be entitled to a deed; and it is claimed that the tax deed offered in evidence fails to comply with these statutory requirements, and is therefore void. (Citing several California cases.) The deed is not printed in the record, and we must presume, in support of the judgment, that it showed the above facts. If it did not, appellants should have so shown. Error must be affirmatively made to appear.

5. Appellants, for the first time, in their reply brief claim that section 32 of the Wright act is special legislation, and therefore void under article 4, section 25, subdivision 33, of the constitution. We think this contention is fully met by the elaborate discussion of the nature, objects, and purposes of irrigation districts, as they exist under the act in question, and the powers conferred on them by that act, found in *In re Madera Irr. Dist.*, 92 Cal. 296.¹ The particular section of the act pointed out comes within the definition of a general law as given in *Pasadena v. Stimson*, 91 Cal. 238, and is constitutional because "it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction." It is not unconstitutional because it cannot be said of it that it "confers particular privileges or im-

¹ 27 Am. St. Rep. 106.

poses peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." (*Pasadena v. Stimson, supra.*)

The deed under which plaintiff claims being valid, it becomes unnecessary to determine the questions arising out of the trust deed and the deed subsequently made by the trustees to the regents of the seminary. Conceding error in excluding the evidence offered, it was harmless, since the assessment and the tax deed were made after defendants' rights had attached.

The judgment and order are affirmed.

TEMPLE, J., concurring.—I concur in the judgment solely on the ground that, in my opinion, the Escondido Seminary of the University of Southern California was never the owner of the property, and has no interest in this controversy. All parties derive title from the Escondido Land and Town Company, which conveyed many lots and blocks by number to certain trustees. Block 340, the property involved here, was not thus conveyed, nor was it mentioned in the granting portion of the deed. In the clause following the *habendum*, in declaring the purposes of the trust, the trustees are directed to sell all the property, save and except block 340, "known as college grounds, . . . which shall be reserved as the seat or campus for said seminary," unless it shall become expedient to erect the buildings on adjacent property. The campus "may be conveyed" to the regents, in trust, for a campus. It is clear that this property did not pass by the deed, and had it been included, the trust, as to it, would have been a mere trust to convey, which is void. (Civ. Code, sec. 857.)

[Sac. No. 677. Department Two.—September 28, 1900.]

JAMES WATERS et ux., Respondents, v. D. C. POOL, Appellant.

ACTION TO QUIET TITLE—VENUE—JURISDICTION—DISMISSAL.—An action to quiet title must be commenced in the county in which the land is situated, and if it is commenced in another county, the superior court thereof has no jurisdiction over the action, and it should be dismissed.

ID.—PLEADING—LOCATION OF LAND—DESCRIPTION—GOVERNMENT SUBDIVISIONS—PLAT—JUDICIAL NOTICE.—A complaint which describes the location of the land involved in such action by government subdivisions and upon a plat which is made part of the complaint, and which thus shows the land to be located in fact in another county, warrants the court in taking judicial notice of that fact, notwithstanding an averment in the complaint that the lands are situated in the county of the venue.

COUNTY BOUNDARY—RIVER—CHANGE OF COURSE AT BEND.—An artificial change in the course of a river, which is the established boundary between two counties, made at the neck of a peninsula created by a bend in the stream, whereby a new channel of the river is caused, and the former channel is ordinarily left without a current, cannot operate to change the legal boundary between the counties.

ID.—LEGAL CHANGE OF BOUNDARY—CHANGED LOCATION OF LAND.—Subsequent acts of the legislature expressly repealing the former acts establishing the boundary, and indicating an intent to define the boundary anew, and to make the changed course of the river the boundary between the two counties, have the legal effect to change the location of the land lying between the old and new channels of the river from one county to the other.

APPEAL from a judgment of the Superior Court of Yolo County. E. E. Gaddis, Judge.

The complaint averred that the lands are situated in Yolo county, and are particularly described as appears by the exhibit thereto attached, marked Exhibit "A," and made part of the complaint, which consisted of a plat and accompanying field notes showing that the land described was situated in the peninsula made by the bend in the former course of the Sacramento river, in the northwest quarter of section 19, township 11 north, range 3 east, Mt. Diablo meridian, and

contained twenty-seven and twenty-eight one-hundredths acres of land in said peninsula, which by the changed course of the river is left separate from the Yolo county side thereof. Further facts are stated in the opinion of the court.

Hudson Grant, for Appellant.

R. Clark, for Respondents.

THE COURT.—This action was brought in Yolo county to quiet title to a twenty-seven acre tract of land located near the Sacramento river. In the complaint the land was described as a certain part of the northwest quarter of section 19 in township 11 north, range 3 east, Mt. Diablo meridian. On the trial defendant (appellant here) objected to the taking of any testimony because it appeared from the complaint that the land in controversy was situated in Sutter county, “and the action was not commenced in Sutter county but in Yolo county.” The objection was overruled and appellant excepted. The judgment was for plaintiff, and within sixty days after its entry Pool appealed to this court.

The objection made went to the jurisdiction of the court, and we think it should have been sustained and the case dismissed. From the description, by government subdivisions, given in the complaint, and the plat made part thereof, the court, we think, should have taken judicial cognizance that the land lay in Sutter county. (*Rogers v. Cady*, 104 Cal. 290.¹)

The question is one of statutory construction, and in the absence of any direct authority to guide us is not free from difficulty, as will be seen from the following statement:

In 1858 the Sacramento river was, by the previous acts of the legislature, the boundary between Yolo and Sutter counties, and the land in controversy was at that time unquestionably in Yolo county, it being on the Yolo side of the river as it then ran. (Stats. 1851, pp. 176, 179; Stats. 1857, p. 108.) It was situated, however, in a bend thereof and nearly surrounded by said river. In that year (1858) some beaver trappers made a small cut or canal across the neck of

¹ 43 Am. St. Rep. 100.

this bend on the Yolo side of the land in question and the waters running therein in a year or two washed such a channel that the river steamboats passed through that way; and since 1862 it has received the main volume of the river water, and "except in times of high water there is no current in the abandoned river bed."

It must be conceded, we think, from what appears in the record, that there was an actual change in the river so as to throw the land in question on the Sutter side of the running stream, at least as early as 1862. It is conceded, however, that this change in the river did not change the county boundary. (See *Missouri v. Kentucky*, 11 Wall. 395; *Nebraska v. Iowa*, 143 U. S. 359.) But it appears from the statutes of 1866, page 162, that the legislature in that year passed an act entitled, "An act to more clearly define and establish the boundary line of Yolo county," and in the same year another act was passed 'more clearly to define the boundaries of Sacramento, Sutter and Placer counties.' (Stats. 1866, p. 223.) Prior to this, in 1864, the legislature had passed another "act to define the boundary lines of the county of Sutter." (Stats. 1864, p. 301.) In all the statutes hereinabove referred to the boundary line between Yolo and Sutter counties is described as "the middle" of the Sacramento river.

The question presented for decision is, Was the boundary between the two counties changed from the middle of the old river to the middle of the new by the acts of 1866? The language of these acts seems to indicate an intention on the part of the legislature to make several changes therein and define anew the boundaries of the respective counties. Neither act is by its terms amendatory of any former act, but the second section of the statute defining the boundary of Yolo county (Stats. 1866, p. 162) reads as follows: "An act entitled an act to define the lines of Yolo county, and to establish its boundaries, approved March 26, 1857, is hereby repealed"; and the act defining the boundaries of Sutter county (Stats. 1866, p. 223) recites that "all acts and parts of acts, so far as they conflict with this act, are hereby repealed." We, therefore, must presume that the legislature used the language defining the boundary advisedly, and in-

tended to fix the middle of the Sacramento river, as said river ran at the date of the passage of the acts, as the boundary between the two counties.

There is no contention that sections 3926 and 3929 of the Political Code were intended to work any change, in the disputed boundary as defined in the acts of 1866, nor is any question made as to the power of the legislature, under the constitution of the state as it existed prior to 1880, by enactment to change the boundaries of counties and establish new boundaries of counties as it saw fit.

For the foregoing reasons we think the land in dispute is in Sutter county, and that the superior court of Yolo county did not have jurisdiction of the cause. (Const. 1880, art. VI, sec. 5.)

The judgment is reversed.

[Sac. No. 620. Department Two.—September 28, 1900.]

L. C. POPE, Appellant, v. FARMERS' UNION AND
MILLING COMPANY, Respondent.

WAREHOUSE RECEIPT—CONTRACT TO RETURN WHEAT—EXCEPTION—
“DAMAGE BY THE ELEMENTS”—ACT OF GOD.—A warehouse receipt for wheat, agreeing to deliver it, “damage by the elements excepted,” upon surrender of the receipt and payment of storage charges, creates an absolute liability to return the wheat, unless prevented by the act of God. “Damage by the elements” is the equivalent of the phrase “act of God.”

Id.—FIRE OF INCENDIARY ORIGIN—RECOVERY OF VALUE OF WHEAT.—
Wheat destroyed or damaged by a fire of incendiary origin is not destroyed or damaged by the act of God. The owner is entitled to recover the value of the wheat so destroyed or damaged.

Id.—ABSENCE OF NEGLIGENCE OF WAREHOUSEMAN—DEFENSE.—The absence of negligence on the part of the warehouseman is no defense to an action to recover the value of the wheat destroyed by an incendiary; and it is not required to be shown that the warehouseman was negligent.

ID.—BURDEN OF PROOF.—Where no issue was raised as to the existence of the contract, the plaintiff need not produce any proof; but it was incumbent upon the defendant to prove that the wheat was in fact destroyed or damaged by the elements.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion of the court.

J. G. Swinnerton, for Appellant.

Woods & Levinsky, and Nicol & Orr, for Respondent.

HENSHAW, J.—Plaintiff sued to recover from defendant the value of certain wheat deposited under the terms of the following written contract:

“Stockton, Cal., July 31, 1897.

“Received of Mrs. L. C. Pope, in the Eureka warehouse, situated on Levee street, Stockton, the following described merchandise, which we agree to deliver (damage by the elements excepted) upon the surrender of this certificate and payment of charges, twenty-seven hundred seventy-six sacks wheat, weighing three hundred eighty-three thousand one hundred forty-six pounds. Rates of storage, seventy-five cents per ton for the season ending June 1, 1898. 2,776 sacks wheat weighing 383,146. Room 6. Pile No. 67. Mark: L. C. P.”

The complaint alleged a demand upon the defendant for the return of the wheat and its failure to comply therewith. The answer of defendant did not deny the existence of the contract, but pleaded that through no negligence upon its part the major portion of the wheat was destroyed by fire, and the rest of it so badly damaged as to be of small value, and offered to restore to plaintiff the damaged wheat in its possession, and the value of such portion of the damaged wheat as it had already sold. Under these pleadings a trial was had before a jury. The plaintiff rested her case without the introduction of any evidence. The evidence for the defense, which was admitted without objection by plaintiff, showed that the warehouse was destroyed by fire, and that

the fire was of incendiary origin. The court instructed the jury, generally, that plaintiff could not recover if it were not shown that defendant was negligent. Verdict passed for defendant, judgment in its favor followed the verdict, and from that judgment, and from an order denying her a new trial, plaintiff appeals.

By its written contract defendant promised absolutely to return the wheat to plaintiff upon surrender of the certificate "damage by the elements excepted." "Damage by the elements" is the equivalent of the phrase "act of God." (*Polack v. Pioche*, 35 Cal. 416¹; *Chidester v. Consolidated etc. Co.*, 59 Cal. 202; *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 261.²) As no effort was made by defendant to reform this contract in any way, it must stand, so far as this case is concerned, exactly as it was written; and, so construing it, it is open to but one interpretation, namely, that defendant's liability to return the wheat was absolute, unless it was prevented from so doing by the act of God. Under this construction of the contract it was no defense for defendant to say, or to show, that the wheat was destroyed without negligence upon its part. It was incumbent upon it to show that the wheat was in fact destroyed or damaged by the elements. The evidence which it adduced tended merely to prove that the fire was of incendiary origin, and thus absolutely to negative the idea that the destruction of the grain was caused by the act of God.

The judgment and order are therefore reversed and the cause remanded.

Temple, J., and McFarland, J., concurred.

Hearing in Bank denied.

¹ 95 Am. Dec. 115.

² 27 Am. St. Rep. 198.

[S. F. No. 1552. Department One.—September 29, 1900.]

P. J. HORAN, Respondent, v. SARAH HARRINGTON,
Appellant.

CHATTEL MORTGAGE—WRITTEN OFFER OF PAYMENT—GOOD FAITH.—A written offer by the mortgagor to the mortgagee before the commencement of a foreclosure suit, to pay a specified sum in full payment and discharge of a chattel mortgage, is an offer of performance, which, in order to be available, "must be made in good faith, and in such a manner as is most likely, under the circumstances, to benefit the creditor," as required by section 1493 of the Civil Code.

ID.—INEFFECTUAL OFFER—FORECLOSURE—RECOVERY OF COSTS AND COUNSEL FEES.—Where no steps were taken, in connection with the written offer of payment, to extinguish the obligation, and it appeared in the action to foreclose the mortgage that the mortgagor had no money with which to make the offer good when it was made, and the court found from the evidence that the offer was not made in good faith, it must be deemed ineffectual for any purpose, and notwithstanding the recovery did not exceed the sum offered, the mortgagee was entitled to recover costs and counsel fees in the action.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

James H. Creely, for Appellant.

Wickliffe Matthews, for Respondent.

GAROUTTE, J.—This is an action brought to foreclose a chattel mortgage. Defendant appeals from the judgment and order denying her motion for a new trial.

A few days prior to the commencement of the action defendant served on plaintiff an offer in writing to pay him one hundred and ninety-four dollars and interest, in full payment and discharge of the obligation. No further steps were taken by defendant in reference to this offer, and it is now conceded that it did not have the effect of extinguishing the obligation. But it is claimed by defendant that inasmuch as

the judgment subsequently rendered was for the amount specified in the written offer, that such offer, therefore, had the effect of depriving plaintiff of any right to a judgment for costs and attorneys' fees. Section 1493 of the Civil Code provides: "An offer of performance must be made in good faith and in such manner as is most likely, under the circumstances, to benefit the creditor." Upon the question of good faith defendant testified that at the time the offer was made she did not have the money to make it good; and upon all the testimony the court made a finding of fact to the effect that the offer was not made in good faith. In view of this provision of the code, taken in connection with the evidence and the findings of fact, we are satisfied that the offer was entirely ineffectual for any purpose as bearing upon the judgment rendered.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

[S. F. No. 1525. Department One.—September 29, 1900.]

DIXIE DAVIS, Respondent, v. ALBERT SCHWEIKERT
et ux., Appellants.

LEASE—TERMINATION UPON SALE—CONSTRUCTION OF COVENANT—GOOD FAITH—FRAUD—CONSIDERATION.—A covenant in a lease for a term of five years, that in case the lessor shall sell the property at any time during the term the lessee shall yield possession, is to be construed as importing an actual sale in good faith for value, and not a fraudulent sale, without valuable consideration, to deceive the lessee, and deprive him thereby of his right of possession.

ID.—ACTION FOR DAMAGES—FRAUDULENT CONVEYANCE BY LESSOR—QUESTION FOR JURY—INSTRUCTIONS.—In an action by the lessee against the lessor and his wife to recover damages for being deprived of his term by a fraudulent conveyance from the lessor to his wife, where the sale was not shown to have been made in good faith or for a valuable consideration, and admissions were shown to have been made by the husband and wife that the deed was in-

tended to get rid of the lessee and to deceive him into surrendering the possession, the court was justified in submitting to the jury the question of fact as to fraud, conspiracy, and consideration for the deed, under proper instructions upon those questions.

1D.—CONDITIONAL ESTATE OF LESSEE—BURDEN OF PROOF UPON LESSOR—SUPPORT OF VERDICT.—The lessee, having received a conveyance of an estate for years upon condition, was entitled to the estate conveyed, unless the lessor could and did show that the conveyance was such a conveyance as was contemplated by the lease, and was made in good faith. Where the lessor and his wife were both witnesses in the action, and neither of them testified as to the true consideration for the deed, nor that it was made in good faith, nor as to its object or purpose, a verdict for the plaintiff, based upon evidence of their manifest intention to get rid of the plaintiff, cannot be disturbed.

1D.—INSTRUCTION AS TO EFFECT OF DEED.—It was correct to instruct the jury that the deed might be good as between the defendants, and yet not affect the rights of the plaintiff.

1D.—INSTRUCTION AS TO PROOF OF "REPRESENTATIONS"—REFERENCE TO PLEADINGS—MODIFICATION—ACTS OF DEFENDANT.—Where the complaint alleged fraudulent conduct and representations of the defendants, intended to deceive the plaintiff, an instruction requested by the defendant that, "in order to sustain the allegations of fraud and deceit, . . . the evidence must be clear and convincing . . . that the representations alleged to have been fraudulent and deceitful were not true," is properly modified by substituting the words "acts of the defendants" for the word "representations."

1D.—INSTRUCTION AS TO OBJECTS OF CONVEYANCES—DEPRIVATION OF POSSESSION—MODIFICATION—GOOD FAITH OF CONVEYANCE.—An instruction requested by the defendants to the effect that the mere fact that one of the objects of the conveyance was to deprive the plaintiff of possession under the lease would not entitle plaintiff to a verdict, was properly modified by adding "if you find that said conveyance was made in good faith." If not made in good faith, and one of its objects was to deprive plaintiff of possession, the plaintiff would be entitled to a verdict in view of the evidence of the admissions made by the defendants.

APPEAL from a judgment of the Superior Court of Lake County and from an order denying a new trial. R. W. Crump, Judge.

The main facts are stated in the opinion.

The first, second and third instructions given for the plaintiff were as follows: "1. Fraud is any cunning deception or artifice used to circumvent, cheat, or deceive another. If you therefore find, from the evidence, that the defendants agreed and conspired together to deprive the plaintiff of his lease, and, in pursuit of said agreement and conspiracy and to carry out the same, the defendant A. Schweikert made to the defendant M. E. Schweikert, his wife, a voluntary, simulated, and sham deed of said leased premises, and made with the deceitful and fraudulent intent to deprive plaintiff of his lease and possession thereof and the plaintiff relying on the good faith and honesty of the deed, and believing that the same was made and accepted in a fair transaction, he quitted the premises, and that plaintiff has been actually damaged by yielding up the possession of the premises, you will find for the plaintiff."

"2. A written instrument is presumptive evidence of consideration. It is only presumptive, however, and the consideration can be inquired into." "3. The deed in question, as having been made by the defendant A. Schweikert to defendant M. E. Schweikert, may be good as between the Schweikerts, and yet not affect the right of Dixie Davis." The fourth instruction asked by the defendant was as follows: "4. In order to sustain the plaintiff's allegations of fraud and deceit, it is necessary that the evidence must be clear and convincing, so as to satisfy the jury, by a preponderance of the evidence, that the representations alleged to have been fraudulent and deceitful were not true." This instruction was modified by substituting for the word "representations" the words "acts of the defendants." The complaint alleged misrepresentation and other fraudulent acts of defendants.

M. S. Sayre, for Appellants.

The deed must be presumed to have had a consideration, and the burden of showing the contrary is upon him who would invalidate it. (Civ. Code, secs. 1614, 1615; Code Civ. Proc., sec. 1963, subd. 39; *Anthony v. Chapman*, 65 Cal. 73; *Poirier v. Gravel*, 88 Cal. 78.) Fraud cannot be presumed, and must be shown by the party alleging it. (Code Civ. Proc., sec. 1981; *Gray v. Galpin*, 98 Cal. 633; *Nathan*

v. Doane, 55 Cal. 348; *Wetherly v. Straus*, 93 Cal. 283; *McCarthy v. White*, 21 Cal. 495.¹) Party alleging fraud or deceit must prove his allegations by clear and convincing evidence; the evidence must be such that, standing alone, uncontradicted, it would establish a clear *prima facie* case of fraud or deceit. (*Jarnatt v. Cooper*, 59 Cal. 703.)

Dan Jones, and R. J. Hudson, for Respondent.

The admission of fraud by each of the defendants was evidence against both of them. (*Mamlock v. White*, 20 Cal. 600.) The verdict is sustained by the evidence; and the instructions as given were correct.

COOPER, C.—Action to recover twelve hundred dollars damages. The case was tried before a jury and a verdict returned for plaintiff in the sum of four hundred dollars. This appeal is from the judgment and an order denying defendants' motion for a new trial. The facts concerning which there is no controversy are substantially as follows:

The defendants are and were at all times named in the pleadings husband and wife. On the twenty-eighth day of October, 1895, the defendant Albert Schweikert executed and delivered to plaintiff a written lease of the premises described in the complaint for the term of five years from the date of the lease, upon the terms and conditions therein set forth. The lease contained the following covenant: "And it is further understood and agreed by and between the parties hereto that, in case the said party of the first part should sell the property herein described at any time during the term of this lease, then the party of the second part shall yield possession and deliver up the within described premises to the party of the first part."

The plaintiff immediately entered into possession under the lease and continued in possession for about one year. It is not claimed that the plaintiff failed in any respect to perform the covenants of the lease on his part, nor that he for any reason forfeited the lease.

¹ 82 Am. Dec. 754.

On the eighth day of October, 1896, the defendant Albert Schweikert executed and delivered to his codefendant a deed of the leased premises for the nominal consideration of six thousand dollars. After this deed was made and recorded, and before the expiration of the lease, the defendant M. E. Schweikert went in person to plaintiff and told him that she had bought the place and paid for it with her own money, and that she wanted possession. The plaintiff relied upon the statement so made to him, and at the end of his first year delivered up possession and vacated the premises. The amount of the verdict is conceded to be correct according to the evidence because it is not challenged. It is alleged in the complaint that the property was not in fact sold by defendant Albert Schweikert to his codefendant, but that the deed was sham and fraudulent and made with the intent and purpose of deceiving the plaintiff and regaining the possession of the leased premises. It is claimed that this allegation of the complaint is not supported by the evidence, and this is the main and controlling question in the case. The lease conveyed to plaintiff the premises for the term of five years, subject to the condition expressly written in the lease that it should terminate upon the property being sold by the lessor. The covenant must be understood as meaning an actual *bona fide* sale, and not a fraudulent one. It was not contemplated—or at least, the law does not contemplate—that the lessor could by a pretended fraudulent sale, made for the very purpose of defeating his lessee of his estate, avoid the lease and thus take advantage of his own wrong. The plaintiff therefore, having a conveyance subject to be defeated upon condition, is entitled and was entitled to the estate so conveyed, unless the defendant could and did show that the conveyance was made in good faith and was such conveyance as contemplated in the lease. We think the evidence is amply sufficient to sustain the verdict. The witness F. H. Seavey testified that in August, 1896, the defendant Albert Schweikert told him that they could not put up with plaintiff any longer and that he could get possession by transferring or selling the property, and that he was going to transfer it to his wife to get rid of plaintiff. The witness further testified that about the 1st of October, 1896,

the defendant Albert Schweikert said to witness in the presence of witness' wife that he was going to get rid of plaintiff. That he asked him how he could do it, and he said "he could as sure as the sun shines." This last statement was also testified to by Mrs. F. H. Seavey. The witness further testified that he was boarding with defendants in December, 1896, and the subject of getting plaintiff off the place was brought up at the supper table, and defendants said that plaintiff "thought he had a fat thing, but they fooled him." That defendant M. E. Schweikert said "they had transferred the property to get rid of Dixie and his lease." Mrs. Seavey testified that Mrs. Schweikert told her that according to the lease they could only get rid of plaintiff in one way, and that was to sell, and that she had bought the place, and her purpose in buying was to get plaintiff off. Another witness for plaintiff testified that he heard defendants laughing about how they had played plaintiff, and that defendant Albert said "he had transferred it to his wife for the purpose of getting Dixie Davis off, he gave me to understand that; his wife heard it, she spoke about it and laughed."

The witness Hays testified that in November, 1897, the defendant told him that he became tired of the way plaintiff ran the place, that it was in the lease that if he sold plaintiff had to give it up, "and so he sold it to his wife." The defendants were both witnesses in their own behalf, and neither of them testified as to the true consideration for the deed, nor that it was made in good faith, nor did they or either of them state anything concerning its object and purpose. We cannot disturb the verdict on the evidence. If the evidence is true the delivery of the possession to Mrs. Schweikert was delivery to her codefendant. The court correctly gave the first and second instructions asked by plaintiff. The evidence hereinbefore recited was sufficient to justify the court in submitting the questions as to fraud, conspiracy, and the consideration for the deed to the jury. The evidence was sufficient upon which to predicate the instructions.

The third instruction asked by plaintiff was correct. It did not assume or state a fact to the jury, but only a principle of law as applied to the rights of plaintiff. The court did not err in modifying the fourth instruction asked by defendant.

The defendant requested the court to instruct the jury as follows: "5. I instruct you that if you believe from the evidence that one of the objects of the conveyance from Albert Schweikert to M. E. Schweikert, of the land leased to the plaintiff, was that he might be deprived of the possession thereof under his lease, that fact, of itself, does not entitle him to a verdict in this case."

The court modified the instruction by adding to it: "If you find that said conveyance was made in good faith." The modification was proper. If the conveyance was not made in good faith, and one of its objects was to deprive plaintiff of the possession under his lease, the plaintiff would be entitled to a verdict under the admissions made in this record.

We advise that the judgment and order be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Garoutte, J., Van Dyke, J., Harrison, J.

[Sac. No. 631. Department One.—September 29, 1900.]

M. MARSTELLER, Respondent, v. B. H. LEAVITT, Appellant.

ORDER GRANTING NEW TRIAL—REVIEW UPON APPEAL.—Upon appeal from an order granting a new trial, only the matters considered by the trial court upon the motion for a new trial will be reviewed by this court.

ID.—INADMISSIBLE EVIDENCE—ACTION FOR BROKER'S COMMISSIONS—ORAL MODIFICATION OF CONTRACT—SALE OF NOTES—MATERIAL ERROR.—In an action to recover broker's commissions upon the sale of real estate payable under the terms of the written contract when the purchase money was paid, where the plaintiff alleged an oral modification of the contract that the commissions would be paid when he obtained a purchaser for the notes, and that he had obtained such purchaser, evidence for the defendant to prove the amount received from the sale of the notes is erroneous in any phase of the case. The ad-

mission of such evidence, after objection, shows that the court deemed it material, and an order granting a new trial for the error will be affirmed upon appeal.

• ID.—FORM OF ACTION—PLEADING—FACTS STATED—CONSTRUCTION—SUPPORT OF JUDGMENT—THEORY OF FACTS.—There is but one form of action in this state, and judgment is to be rendered upon the facts stated in the pleadings, the averments of which are to be liberally construed to support a judgment based upon any sound theory of the facts alleged.

ID.—MATURITY OF COMMISSIONS—SALE OF NOTES—DISCOUNT—EVIDENCE NOT HARMLESS.—If it be conceded that, as matter of law, the sale of the notes by the defendant, *ipso facto*, rendered the claim of plaintiff for commissions due, and that the facts stated in the complaint would support a recovery upon that theory, the right of recovery cannot be denied merely because defendant may have sold the notes at a discount; and the admission against plaintiff's objection of inadmissible evidence of the amount received at the sale of the notes cannot be said to be harmless.

APPEAL from an order of the Superior Court of Lassen County granting a new trial. N. T. Mastin, Judge rendering judgment. F. A. Kelley, Judge settling statement. C. E. McLaughlin, Judge granting new trial.

The facts are stated in the opinion of the court.

Goodwin & Goodwin, for Appellant.

The execution of the written contract was admitted, and there was no issue to be tried thereupon; and a finding contrary to such admission cannot be ground for a new trial. (*In re Doyle*, 73 Cal. 570.) The substantial rights of the parties were not affected by the admission of evidence as to the amount received on the sale of the notes. (Code Civ. Proc., sec. 475; *Persse v. Cole*, 1 Cal. 369; *Priest v. Union Canal Co.*, 6 Cal. 170; *Young v. Emerson*, 18 Cal. 416; *Henry v. Everts*, 30 Cal. 425; *People v. Collins*, 75 Cal. 411; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 280; *O'Callaghan v. Bode*, 84 Cal. 496; *Clavey v. Lord*, 87 Cal. 421; *Zumwalt v. Dickey*, 92 Cal. 156.)

W. M. Boardman, and M. Marsteller, in *pro. per.*, for Respondent.

The overruling of the objection to the admission of the evidence as to the amount of the notes shows that the court deemed its admission material. (*Storch v. McCain*, 85 Cal. 308; *Rice v. Heath*, 39 Cal. 609; *Sweeney v. Reilly*, 42 Cal. 402; *Spanagel v. Dellinger*, 38 Cal. 283.) And the court properly granted a new trial for the error. Upon the sale of the notes and mortgage, they were, in contemplation of law, paid to the defendant, and a recovery could be had under the written contract for the payment of the commissions. In contemplation of law, defendant has received plaintiff's money. (*Wolf v. Marsh*, 54 Cal. 228; *Long v. Saufley*, 79 Cal. 260; *Poirier v. Gravel*, 88 Cal. 79.)

GAROUTTE, J.—This is an appeal from an order granting a motion for a new trial. The action was one involving a claim for commissions based upon a sale of real estate. The claim is primarily evidenced by a contract in writing. Under this writing plaintiff was to receive his commissions when certain notes taken by the vendor of the real estate from the vendee were paid. In addition to the aforesaid written contract, plaintiff by his pleadings, set forth an oral contract whereby he claimed a modification thereof as to the time of the payment of the commissions. This alleged modification was to the effect that the commissions would be paid when plaintiff found a purchaser for the aforesaid notes. There is also an allegation to the effect that he found such purchaser, and the notes held by the vendor were sold to that party. The court found against the alleged modification of the original contract, but found that a sale of the notes had been made. There was no issue as to the due execution of the original contract, other than as to the existence of a sufficient consideration upon which to base it. But upon that matter we will not here dwell. Judgment went for defendant, and plaintiff was granted a new trial.

Upon this appeal we are only allowed to investigate the matters considered by the trial court upon the motion for a new trial. And we deem it only necessary to direct our attention to the consideration of one of these matters. Under objection, defendant was allowed to prove the amount he re-

ceived from the purchaser upon the sale of the notes. This was error upon any conceivable phase of the case, and respondent now concedes the ruling to be erroneous, but claims the evidence was harmless, and therefore the error committed was not prejudicial. It is hardly consistent for respondent's counsel to insist upon the admission of evidence, under objection from the other side that it is immaterial, and after its admission, when error is predicated upon the ruling, to then insist that the evidence was immaterial and therefore did no harm. The fact alone that the court admitted the evidence after objection made is the strongest kind of an indication that the court deemed it material, and, so deeming it, gave it weight in making the judgment in the case. Indeed, it is impossible for this court to say that this evidence had no effect upon the mind of the trial court in pointing the judgment.

Plaintiff has advanced a theory in his brief whereby he claims that in law a sale of these notes by defendant, *ipso facto*, rendered his claim for commissions due. Pleadings are liberally construed in this state. There is but one form of action, and judgment is rendered on the facts stated in the pleadings. Possibly, the complaint in this action is sufficient in its facts to support a judgment based upon this theory of the cause, conceding, of course, that the proposition of law, as claimed, is sound. Perhaps the evidence admitted indicated that the notes were sold at a great discount, and for this reason the court denied plaintiff's right of recovery. Of course, this is only speculation, but it tends to show that this court cannot say that the error committed by the trial court in the admission of this evidence was harmless. It is said in *Storch v. McCain*, 85 Cal. 308: "The overruling of the objection to admitting it on the ground that it was irrelevant and immaterial indicates that in the opinion of the court it was relevant and material. That the court attached some importance to this evidence we are bound to presume from his admitting it against the objection made to it."

For the foregoing reasons the order is affirmed.

Harrison, J., and Van Dyke, J., concurred.

[S. F. No. 1507. Department One.—September 29, 1900.]

EUREKA MERCANTILE COMPANY, Appellant, v. CALIFORNIA INSURANCE COMPANY, Respondent.

CORPORATION—JUDGMENT IN ANOTHER STATE—JURISDICTION OF PERSON—CESSATION OF AGENCY.—Service of summons in an action commenced in another state against a corporation of this state by delivery of process therein to a former agent of the corporation, which had ceased to do business in that state, and had no agency or agent therein at the time of such service, could not give jurisdiction of the person of the corporation to a court of that state; and a judgment based upon such service cannot create a right of action against the corporation in the courts of this state.

ID.—PROOF OF AGENCY—RECITAL IN JUDGMENT—ACTION UPON JUDGMENT—DISPROOF.—The recital in the judgment that "proof was made in open court that the person on whom service was made was agent of the defendant at the time of the service of the summons and complaint on him," is not conclusive of the jurisdiction of the person of the corporation, and does not preclude the corporation, in an action upon the judgment, from showing that such person was not such agent.

ID.—STIPULATION OF PARTIES—DEFEAT OF PRESUMPTION.—The stipulation of the parties in the action upon the judgment that the person served was not an agent of the defendant at the time of the service, defeats any presumption arising from the recital of proof in the judgment.

ID.—RECITAL NOT RES ADJUDICATA.—The recital in the judgment rendered in the absence of the defendant is not *res adjudicata*, and cannot estop the defendant. No issue as to the agency for the defendant of the person served was presented to the court for determination.

ID.—REFUSAL TO SET ASIDE JUDGMENT—CONCLUSIVENESS NOT SHOWN.—The mere refusal of the court of the other state to set aside the judgment, on motion of the defendant at some subsequent date, not appearing, and upon grounds not shown, and which does not show that it had obtained jurisdiction of the defendant, and which refusal is no part of the judgment record, cannot be held to conclude the defendant.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Lloyd & Wood, for Appellant.

The respondent is precluded from obtaining judgment by the doctrines of *res adjudicata* and estoppel. (*Moch v. Virginia Fire Ins. Co.*, 10 Fed. Rep. 696; *Moulin v. Trenton etc. Ins. Co.*, 25 N. J. L. 57; *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737; *Verneuil v. Harper*, 28 La. Ann. 893; *Bonsell v. Isett*, 14 Iowa, 309; *Capen v. Pacific Mut. Ins. Co.*, 25 N. J. L. 67.¹)

E. W. McGraw, for Respondent.

In an action upon a foreign judgment, the defendant may attack the jurisdiction of the court by evidence *dehors* the record. In an action on a foreign judgment defendant has a right to attack the jurisdiction of the foreign court by evidence *dehors* the record. (*In re Estate of James*, 99 Cal. 374-77²; *Greenzweig v. Strelinger*, 103 Cal. 278, 279; *Kingsbury v. Yniestra*, 59 Ala, 320.) Service of process upon a former agent of a corporation, who has ceased to be such, does not confer jurisdiction of its person. (Alderson on Judicial Writs, 192; *Amy v. Watertown*, 130 U. S. 301.) No valid judgment by default can be obtained against a foreign corporation which is not doing business in the state when summons is served, and such fact must appear by the judgment-roll; it cannot be proved *aliunde*. It does not appear by return of a sheriff that he served the summons on an agent of the corporation. (*St. Clair v. Cox*, 106 U. S. 350-60; *Henning v. Planters' Ins. Co.*, 28 Fed. Rep. 440; *United States v. American Bell Teleph. Co.*, 29 Fed. Rep. 17-35; Reno on Nonresidents, sec. 217, p. 261; *Sullivan v. Sullivan Timber Co.*, 103 Ala. 371.) In this case, however, it is agreed that the California Insurance Company was not doing business in Alabama when service was made.

HARRISON, J.—The plaintiff brought this action upon a judgment rendered in its favor against the defendant in the circuit court of the state of Alabama. Judgment was rendered in favor of the defendant, and the plaintiff has appealed.

¹ 64 Am. Dec. 412.

² 37 Am. St. Rep. 60.

The defendant is a corporation organized under the laws of this state, with its office and principal place of business at San Francisco. In the action brought against defendant in the state of Alabama, service of process was made upon a person who had, at one time, been the agent of the defendant in that state, but who had ceased to be such agent prior to the time of said service, and at that time the defendant had ceased doing business in the state of Alabama and had no agency or agent within the state. Upon this service the defendant made default, and judgment was rendered against it for the amount claimed by the plaintiff.

Under these facts it must be held that the circuit court of Alabama did not obtain jurisdiction of the person of the defendant, and that the judgment entered against defendant did not create a right of action against it in the courts of this state. (*St. Clair v. Cox*, 106 U. S. 350; *Henning v. Planters' Ins. Co.*, 28 Fed. Rep. 440.) The jurisdiction of the Alabama court was an essential part of the plaintiff's cause of action herein, and it was incumbent upon the plaintiff to make proof of such jurisdiction in order to entitle it to judgment. The recital in the judgment that "proof was made in open court that George Eustice, on whom service was made in this cause, was agent of defendant at the time of service of the summons and complaint on him" is not conclusive of the jurisdiction of the court over the defendant, and does not preclude defendant from showing that Eustice was not such agent. (*In re Estate of James*, 99 Cal. 374³; *Greenzweig v. Strelinger*, 103 Cal. 278.) The stipulation of the parties herein in the court below, that he was not such agent at the time of service, defeats any presumption arising from such recital.

Neither can the contention of the appellant that the defendant is estopped from contesting the jurisdiction by reason of the fact that such agency was determined in the Alabama court, and is therefore *res judicata*, be maintained. The above recital in the judgment was without any appearance on the part of the defendant, and in its absence; nor was there any issue of such agency presented to that court for determination. The refusal of the court at a subsequent date

³ 37 Am. St. Rep. 60.

to set aside the judgment, upon the motion therefor on behalf of the defendant, is no part of the judgment record, nor does it appear at what time the motion was made, or upon what ground the court based its refusal. Even if this action of the court could be considered, there is nothing in the record from which it can be held that there was any decision by it that it had obtained jurisdiction of the defendant. Its refusal to set aside the judgment may have been upon a question of procedure.

The judgment is affirmed.

Garoutte, J., and Van Dye, J., concurred.

[Sac. No. 632. Department One.—October 1, 1900.]

JAMES M. STEINBERGER, Appellant, v. AUGUST MEYER and EMMA MEYER, Respondent.

WATER RIGHTS—UNCERTAIN JUDGMENT—REVERSAL UPON APPEAL.—A judgment in an action involving the rights of the parties in the flow of the waters of a creek, which, when its parts are read together and considered as a whole, is unsatisfactory and uncertain, and not sufficiently explicit to determine all the rights of the parties, and the amount of water to which each is entitled, must be reversed upon appeal.

APPEAL from a judgment of the Superior Court of Lassen County. F. A. Kelley, Judge.

The facts are stated in the opinion of the court.

Goodwin & Goodwin, for Appellant.

Spencer & Raker, and H. D. & G. S. Burroughs, for Respondents.

GAROUTTE, J.—This litigation involves the respective rights of the parties to the use of the waters of a certain creek known as Willow Ranch creek. Plaintiff in his complaint alleged a diversion of these waters by defendants, without right,

and sought a permanent injunction, with damages. Defendants admitted a diversion of twenty-five inches of the waters of the creek, and claimed the right to so divert. They also claimed rights as upper riparian owners, and rights by reason of an artificial increase of the flow of waters of certain springs which were situated upon their land, and which to some extent (possibly quite limited) formed the source of supply of the aforesaid creek. The findings of fact do not squarely meet all the issues, and the judgment rendered is not clear and explicit as to the respective rights of these parties in the waters involved.

The judgment rendered provided: "1. That plaintiff, as against defendant, is the legal and lawful owner in and to all the water of Willow Ranch or Steinberger creek, and every part thereof and has the legal and lawful right to divert at any and all times all of the water from said creek and use the same for irrigation and domestic use and purposes; 2. That defendant as against plaintiff is lawfully entitled at any and all times to the free and unobstructed flow and to the diversion and use of sufficient water to and from said springs to properly and thoroughly irrigate in the aggregate three acres of land and for domestic use and purposes." Nothing is said in this judgment as to the injunction prayed for and each party is allowed his costs. By respondents' brief it is asserted that the claim made in their answer to a right of diversion of twenty-five inches of water of Willow Ranch creek was abandoned during the trial. But we find no suggestion to that effect in the record. The present appeal is taken by plaintiff from the judgment, without a bill of exceptions.

We will not enter into a consideration of the sufficiency of the findings of fact to support the judgment rendered, for we have concluded that the judgment itself is of such a character as to justify plaintiff in appealing from it. Laying aside the question of a perpetual injunction—to which plaintiff would seem to be entitled if defendants were, in fact, diverting twenty-five inches of water from the aforesaid creek without right—more serious questions present themselves. The various parts of the judgment must be read together, and, taken as a whole, it is not satisfactory or explicit. The first portion of the judgment seems to give plain-

tiff the use of all the waters of the creek. Yet that right to the use of all these waters seems to be curtailed by the second portion of the judgment. Indeed, as the judgment now stands, it can only serve the single purpose of furnishing the groundwork for future litigation, and plaintiff is certainly entitled to something more. He is entitled to a plain and explicit adjudication, declaring what his rights are to these waters, and what defendants' rights are to the waters, if they have any. As to the percolating waters defendants have gathered together in springs upon their lands by artificial means, it would seem plaintiff has no concern. But as to any interference with the waters of these springs, by which their usual and natural flow is prevented from passing down Willow Ranch creek to the lands of plaintiff, that is an entirely different question. Again, it is utterly impossible to determine from the language of the judgment how much water is necessary to "properly and thoroughly irrigate in the aggregate three acres of land." If that water is produced by the exertions of defendants, probably the quantity is an immaterial matter to plaintiff, but if it is water coming from these springs, which, without artificial means, would flow by way of the creek to plaintiff's land, it is a very material matter to him. The quantity of land the defendants may irrigate seems to be immaterial. The question here presented is, as to the amount of water the respective parties should be awarded. As to whether or not defendants, by the judgment, are given the use of any of the waters by reason of their upper riparian ownership, it is impossible to say. Neither do we see anything in the findings of fact bearing specially upon that question.

For the foregoing reasons the judgment is reversed.

Harrison, J., and Van Dyke, J., concurred.

[Crim. No. 629. Department Two.—October 1, 1900.]

THE PEOPLE, Respondent, v. FRED BENC, Appellant.

CRIMINAL LAW—POSTPONEMENT OF TRIAL BEYOND SIXTY DAYS—DISMISSAL—"GOOD CAUSE"—ENGAGEMENT IN ANOTHER TRIAL.—The fact that the court is engaged in the trial of another case, the trial of which extends beyond the period of sixty days after the filing of the information, is "good cause," within the meaning of section 1382 of the Penal Code, providing that "the court, unless good cause to the contrary is shown, must order the prosecution dismissed . . . if a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment or filing of the information."

ID.—CONSENT OF DEFENDANT TO POSTPONEMENTS.—The consent of the defendant to postponements of his trial made from time to time, if not equivalent to a delay granted at his request, is "good cause" for the delay within the meaning of section 1382 of the Penal Code.

ID.—RAPE—CROSS-EXAMINATION OF PROSECUTRIX UNDER AGE—WANT OF CHASTITY—IMPEACHMENT.—Where the prosecutrix is under the age of consent, her testimony to a forcible rape committed by the defendant, and that no one else had had carnal intercourse with her, cannot be impeached by evidence that she had led an unchaste life.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—HARMLESS ACTION.—Alleged misconduct of the district attorney in stating that the defendant's attorney knew he could not prove want of chastity of the prosecuting witness, is harmless; and alleged misconduct on his part in argument in calling the attention of the jury to the fact that certain witnesses were not called for the defense, is not prejudicial, where the statement was stricken out by the court and the jury were instructed to disregard it.

ID.—EVIDENCE—UNUSUAL APPEARANCE OF PROSECUTRIX—NEARNESS TO EVENT.—The evidence of a member of the family, who had left the house where the alleged rape was committed early in the morning and who returned to the house within one hour after the occurrence, that he noticed that the appearance of the prosecutrix was unusual, that her hair was tousled, her face was red, and that she seemed nervous, was admissible as bearing on the effects of the act charged upon her person, and the time of observation was not so remote from the event as to make the evidence immaterial.

ID.—TESTIMONY OF PHYSICIANS—SUBSEQUENT CONDITION OF SEXUAL ORGANS.—The testimony of physicians as to the condition in which the sexual organs of the prosecutrix were found some four

to six days after the alleged rape is admissible, the remoteness of the evidence going merely to its probative force, of which the jury were the judges.

ID.—EXPERT EVIDENCE—POSSIBILITY OF FORCIBLE RAPE—EVIDENCE STRICKEN OUT.—The testimony of a physician as to the possibility of forcible intercourse between a man and a well-developed girl, weighing one hundred and thirty-eight pounds, without her consenting to the act, was properly excluded, as not being the subject of expert evidence; and an opinion given by a physician that a man, however strong, cannot commit the act of coition with a vigorous, well-developed woman, while she is struggling to prevent it, which was not responsive to the question asked, was properly stricken out.

ID.—PROPORTION OF TRUE TO FALSE CHARGES OF RAPE—INCOMPETENT EVIDENCE—REMARK OF COURT.—The statement of a physician on cross-examination, though not objected to, that medical authorities place the proportion of true to false charges of rape as one to twelve, was so clearly incompetent and improper as to render a remark by the court that that statement would have nothing to do with any particular case, which must stand on its own merits, not legally prejudicial to the appellant.

ID.—REOPENING CASE FOR PROSECUTION—DISCRETION.—The court had discretion to allow the district attorney to reopen the case of the prosecution for further testimony; and there is no error in so doing where no abuse of discretion appears.

ID.—HARMLESS INSTRUCTIONS—MODE OF EXERCISE OF POWERS OF JURY—DETERMINING CREDIT OF WITNESS.—Instructions relating to the mode of the exercise of the powers of the jury, in determining the credit of a witness or the corroboration of the prosecutrix, which are not untrue or erroneous, except as they may infringe the province of the jury, are harmless, and not prejudicial error, where they merely tell the jury what they evidently knew, or would evidently do, without being so told.

ID.—REQUESTED INSTRUCTIONS SUBSTANTIALLY GIVEN.—It is not error to refuse to give proper instructions requested where the court gave instructions to the same effect of its own motion.

ID.—OPPORTUNITY FOR RAPE—REFUSAL OF INSTRUCTION.—An instruction requested by the defendant that "the fact that the defendant may have had an opportunity to commit the rape . . . can have no weight, unless it excludes all reasonable opportunity for its commission by another, and standing alone is insufficient to sustain conviction," was properly refused, because the first part of it is incorrect, and because the instruction infringed upon the province of the jury.

ID.—CONSENT AND FORCE—INSTRUCTIONS REFUSED.—The prosecuting witness being under the age of consent, requested instructions involving the subjects of consent and force were properly refused.

ID.—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—Where the prosecutrix testified that she scratched the face of the defendant, and the case had been twice tried, affidavits of persons who met the defendant from one to three days after the event that they saw no scratches on his face, which do not satisfactorily meet the requisites of newly discovered evidence, do not render the denial of a new trial on that ground an abuse of discretion.

ID.—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—TESTIMONY OF PROSECUTRIX—ALIBI.—Where the testimony of the prosecutrix, if believed, is sufficient to support the verdict, they may convict on her evidence alone; and the truth or falsity of the evidence being a matter exclusively for the jury, a new trial cannot be granted because the testimony for the defendant tends strongly to prove an alibi, and because the jury might properly have discredited the prosecutrix.

APPEAL from a judgment of the Superior Court of Tulare County and from an order denying a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion.

J. S. Clack, E. W. Holland, and Herman T. Miller, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

CHIPMAN, C.—Defendant was convicted of the crime of rape, alleged to have been committed on one Maude Yates, a female under the age of sixteen years, and he was sentenced by the court to five years' imprisonment in the state prison. From the judgment and from an order denying his motion for a new trial defendant appeals.

1. Defendant moved to dismiss the case on the ground that he had not been brought to trial within sixty days after the filing of the information.

The record shows that the information was filed March 10, 1899, and the trial began June 6th following.

It appears that the case was continued from March 17th until May 19th, and that the continuances were all ordered by consent of defendant. It also appears that from April 5th until June 1st the court was continuously engaged in

the trial of another cause, and for a time after June 1st, not stated, was also similarly engaged.

Defendant cites section 1382 of the Penal Code, and *People v. Buckley*, 116 Cal. 146. Section 1382 is as follows: "The court, unless good cause to the contrary is shown, must order the prosecution dismissed in the following cases: . . . 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

The fact that the court was engaged in the trial of another case was good cause for excluding the time the court was so engaged from the statutory period of sixty days. (*People v. Henry*, 77 Cal. 445.) We think, also, that if the consent of defendant to the postponements from time to time was not equivalent to an application by him for postponement, it was sufficient excuse for the delay. In *People v. Cline*, 74 Cal. 575, the delay was caused by the defendant objecting to have the cause set down for trial, and the court held this as equivalent to a delay granted at the request of defendant and presumably for his benefit. The court did not err in denying the motion to dismiss.

There are numerous other specifications of errors which call for examination. As some of these depend, more or less, upon the nature of the case before us, it should be remarked that the prosecutrix was a girl less than sixteen years old, strong and in good health; her testimony was that defendant came to her mother's house when no other persons but herself and defendant were there, about 10 o'clock on the morning of February 24, 1899, and while there compelled her by force to submit to his having carnal intercourse with her. It does not seem necessary at this point it at all, to give the details of the occurrence.

2. Upon the cross-examination of the prosecutrix, defendant sought to show that she had led an unchaste life, and it is now urged that the evidence was admissible, as tending to show whether she spoke the truth in testifying that defendant had forcibly accomplished his purpose, and especially to contradict her testimony that no one previously had ever had carnal intercourse with her. The trial court held that the evidence was immaterial and refused to allow

the questions. Defendant cites *State v. Duffy*, 128 Mo. 549. This case seems to support defendant's contention that the evidence was admissible to contradict the prosecutrix, but it is held the other way by this court. (*People v. Johnson*, 106 Cal. 289.)

3. While this point was under discussion, and after defendant's attorney had commenced to state what he assumed he could show, but was interrupted by the court, the district attorney remarked: "You know very well you couldn't prove any such thing." It is urged that this remark in the presence of the jury was prejudicial to defendant's case and conveyed the impression that defendant's attorneys were attempting to prove something which they knew to be untrue. Conceding this to be misconduct on the part of the district attorney, we do not think that it could have influenced the jury to defendant's prejudice.

4. The witness Ferrill for the prosecution, who lived in the family of the prosecutrix, testified that he left the house in the morning shortly after breakfast, and returned at noon for his dinner, when he found the prosecutrix alone preparing the noon meal. He was asked if he noticed "anything unusual about her appearance," and what her appearance was. Defendant objected as immaterial and incompetent and no part of the *res gestae*. The witness was allowed to answer, and proceeded to describe her appearance. He testified: "Well, noticed her face flushed red, and her hair was all kind of tousled. Her hair was uncombed. That was an unusual condition for her. She generally kept herself neat and clean." To another question, which was objected to, he answered: "She seemed kind of nervous like. She didn't seem to be the same." He also testified that he asked her what made her face so red and answered: "I believe she said she had been standing over the stove." The prosecutrix testified that defendant accomplished his purpose after 11 o'clock, and that the witness Ferrill returned before 12 o'clock. Evidence of the physical condition or appearance subsequent to the date of the alleged rape, so far as the appearance bore upon the act charged or its effects upon the person of the prosecutrix, was admissible. The time when the witness observed the prosecutrix was not so remote as to make the evidence immaterial.

5. A similar question is presented in the evidence of a physician, Dr. Rosson, who testified to the condition in which he found the sexual organs of the prosecutrix some four to six days after the alleged rape. Defendant objected as immaterial and incompetent and not part of the *res gestae*. The evidence was admissible. It has been held that the condition of the hymen six months after the alleged rape may be shown, the remoteness of the evidence going merely to its probative force. (*Gifford v. People*, 148 Ill. 173.) The jury were the judges of its probative force. The same may be said as to the testimony of the other physicians, to the same effect as that of Dr. Rosson.

6. Defendant asked the witness, Dr. Rosson, the following question: "As a physician, having knowledge of the strength and physical condition and development of a man and of women, do you think it possible for a man to have forcible intercourse with a girl well developed and weighing one hundred and thirty-eight pounds, without her consenting to the performance of such sexual act?" An objection of the district attorney to the question was sustained, and this ruling is claimed to be error. Without stopping to inquire if the proposition involved in this question was admissible at all, under *People v. Johnson, supra*, it is enough to say that it is not a subject for expert opinion. The jury were as competent to answer the question as a physician would be. Therefore, there was no error in the ruling.

7. Dr. Field, called for the prosecution, testified on cross-examination, without objection, that medical authorities place the proportion of true to false charges of rape as one true charge to twelve false ones. The court remarked: "I don't see what that would have to do with any particular case. . . . Because the guilt or innocence of the defendant would not depend at all upon the proportional cases laid down by physicians in any case. Each case should stand on its own merits." Appellant contends that these remarks were so prejudicial to him as to warrant a reversal; but we do not think so. The statement of the witness which called forth the remark of the court was so clearly incompetent and improper as evidence that it was quite natural for

the court to make the remark complained of; and as appellant had no right to have such a statement go to the jury in the shape of evidence, he cannot complain that he was prejudiced by the remarks of the court. It is, no doubt, better for the court to allow the prosecuting attorney to conduct the examination of witnesses; but in this instance we think it apparent that the appellant suffered no legal prejudice by the remarks of the court, even though it would have been in better taste if the court had refrained from making them.

8. Dr. Combs was a witness for the defendant, and on cross-examination made an answer, not responsive to the question, in which he gave it as his opinion that a man, however strong he may be, cannot commit the act of coition with a vigorous, well-developed woman while she is struggling to prevent it. The court struck out the answer, on the motion of the district attorney, as not responsive and as not proper expert testimony. We see no error in the ruling.

9. The court allowed the district attorney to reopen the case for further testimony. It was within the discretion of the court to do this, and as no abuse of the discretion appears there was no error.

10. During the argument for the prosecution the deputy district attorney mentioned the fact that the witness Dr. Reed, "who knew about the marks on defendant's face and was subpoenaed by the defense, was not called as a witness by the defense; also that Chambers, the constable who arrested the defendant, was not called by the defense"; to which statement defendant objected as prejudicial to the rights of the defendant. "Thereupon the court ordered the statement stricken out and instructed the jury to disregard it." In *People v. Lee Chuck*, 78 Cal. 317, the reprehensible conduct of the district attorney was called to the attention of the trial court, but the court declined to check the attorney. In the present case the court promptly ordered the remarks stricken out and instructed the jury to disregard them. We do not think that the incident is ground for reversal. (*People v. Ah Fook*, 64 Cal. 380.)

11. It is urged that the court erred in giving the following instructions: "The degree of credit due to a witness should be determined by his character and conduct, by his demeanor

on the stand, his relation to the controversy and the parties, his hopes, his fears, his bias and his partiality, the reasonableness of the statements he makes, the strength or weakness of his recollection viewed in the light of all the testimony, the facts and circumstances in the case."

It is claimed that the jury were thus told how they should determine the degree of credit due to a witness, and that it was an invasion of the province of the jury, who are the sole judges of the credibility of the witnesses. *People v. Newcomer*, 118 Cal. 263, is cited, where, among other things, the court said: "It is not proper for the court to direct them [the jury] as to the methods by which they shall exercise their own powers." While condemning this form of instruction the court said "it could not possibly have done any harm; for it was merely telling the jury to do certain things which jurors would evidently do without being so told"; and for the same reason the instruction here complained of was not prejudicial error.

12. The jury were instructed that if they found from the evidence that the mother of the prosecutrix was the first person she saw in whom she was expected to place confidence after the offense was alleged to have been committed, and that she communicated to her mother at the first opportunity that her person had been forcibly outraged, as charged in the information, "then you have a right to consider such communication as a circumstance in corroboration of the testimony of Maud Yates," the prosecutrix. It is contended by appellant that this was an instruction as to the weight and force of evidence and facts, and was thus an encroachment upon the province of the jury. Conceding that this was an improper instruction, because infringing upon the province of the jury within the rule so often declared here, still it was plainly not prejudicial to the appellant. The instruction was not, in itself, wrongful or erroneous; and as was said in *People v. Newcomer*, *supra*, and in other cases decided by this court, the instruction was merely telling the jury things which the jurors evidently knew without being so told.

13. Conceding that the first instruction asked by defendant and refused was proper and should have been given, it

was not error to refuse it, for the reason that the court gave one to the same effect on its own motion. The same may be said of defendants' instruction numbered.

14. Defendant asked the following instruction, which was refused: "The fact that the defendant may have had an opportunity to commit the rape can have no weight unless it excludes all reasonable opportunity for its commission by another, and, standing alone, is insufficient to sustain conviction." This instruction was properly refused: 1. Because the first part of it is incorrect, and, therefore, there was no error, under any view, in refusing the instruction as a whole; and 2. The instruction, if given, would have been an infringement upon the province of the jury in the same manner as instructions by the court objected to by appellant as hereinbefore stated, were infringements upon the province of the jury. There is nothing in the case of *People v. Tarbox*, 115 Cal. 57, which would make the refusal to give this instruction error.

15. Instructions 9 and 13, asked by defendant, were properly refused because they introduced the elements of consent and force, which have nothing to do with cases of this class. The portions of these instructions with the consent and force elements eliminated were in effect given elsewhere by the court.

16. It is urged that a new trial should have been granted on the ground of newly discovered evidence. Several affidavits of persons who claim to have met the defendant at different times from one to three days after the alleged offense was committed were used on the motion. These persons stated that they saw no scratches or marks on defendant's face, and some of affiants stated they were quite sure they would have noticed any such scratches if there had been any there.

There was evidence introduced at the trial by defendants to this same effect. These affiants were friends or acquaintances of defendant whom he met. The case was tried once before. The requisites to granting a new trial on the ground of newly discovered evidence will be found stated in *People v. Urquidas*, 96 Cal. 239. We cannot see that these requisites are satisfactorily met in the present case; nor can we say that the court abused the discretion with which the law clothes it in applications made on this ground.

17. Finally, it is very strongly urged that the evidence was insufficient to justify the verdict of guilty. We have carefully scrutinized the testimony, as requested by defendant's counsel.

The defendant denies the story told by the prosecutrix *in toto*, and testifies that he was not at the Yates house at all on the day of the alleged rape. His alibi is his principal reliance, and is clearly supported by the testimony of his wife, and, to some degree, by other witnesses who testified that they saw defendant about 11 o'clock on February 24th at a different part of the town from the Yates house. There is quite enough evidence to have warranted the jury in discrediting the story as told by the prosecutrix. But we cannot say that it was such as to convince us that the verdict was given under the influence of passion or prejudice. If the jury believed the prosecutrix they could convict on her evidence alone (*People v. Logan*, 123 Cal. 414); and we do not think the case here is one, as was suggested in *People v. Logan, supra*, where the court would be authorized, as matter of law, to deal with the improbability of the evidence. The verdict finds support in the evidence and its truth or falsity was a matter exclusively with the jury.

The judgment and order should be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[L. A. No. 881. Department Two.—October 2, 1900.]

WARREN M. CROUSE, Administrator, etc., of Lafayette Woodward, Deceased, Appellant, v. E. W. PETERSON, Respondent.

ESTATES OF DECEASED PERSONS—SALE OF LAND—ACTION FOR PURCHASE PRICE.—The personal representative of the estate of a deceased person may maintain an action against a purchaser of land belonging to the estate, and which was bought by him at a probate sale, to recover the purchase price. The remedy provided by the probate law for a resale of the property is not exclusive.

ID.—DISCRETIONARY POWER OF SALE—ADMINISTRATOR WITH WILL ANNEXED.—A power to sell lands of the testator given by a foreign will to the executor named therein, the exercise of which is discretionary with him, does not vest in an administrator with the will annexed appointed in this state as to lands there situated, so as to validate a sale of such lands made without a prior authorization of the probate court, and for a purpose not administrative. And this is so, although by the laws of the state of the domiciliary administration an administrator with the will annexed is given the same power to sell and convey real estate that the person named in the will as the executor could have had in executing the will.

ID.—EQUITABLE CONVERSION.—In this state, the fact that the entire estate of a testator, both real and personal, is distributed as one fund does not raise any presumption of an equitable conversion of land into money.

APPEAL from a judgment of the Superior Court of San Diego County. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

Withington & Carter, and Hahn, Belden & Hawley, for Appellant.

The power vested in the executor by the will passed to the administrator with the will annexed. (Code Civ. Proc., secs. 1326, 1426; *Kidwell v. Brummagim*, 32 Cal. 442; *Elmer v. Gray*, 73 Cal. 284; *Cohea v. Johnson*, 69 Miss. 46; *Chambers v. Tulane*, 9 N. J. Eq. 158; *Howell v. Sebring*, 14 N. J. Eq. 89; *Giberson v. Giberson*, 43 N. J. Eq. 116; *Brown v. Arm-*

stead, 6 Rand. (Va.) 594; *Elstner v. Fife*, 32 Ohio St. 358; *Orrender v. Call*, 101 N. C. 399; *Davis v. Hoover*, 112 Ind. 423; *Jackman v. Delafield*, 85 Pa. St. 381; *Lantz v. Boyer*, 81 Pa. St. 325; *Maus v. Maus*, 80 Pa. St. 194; *Evans v. Chew*, 71 Pa. St. 47; *Potts v. Breneman*, 182 Pa. St. 295; *Tarrence v. Reuther*, 185 Pa. St. 279; *Dent v. Maddox*, 4 Md. 530; *Keplinger v. Maccubbin*, 58 Md. 212; *Wilcoxon v. Reese*, 63 Md. 546; *Venable v. Mercantile Co.*, 74 Md. 187; *Bay v. Posner*, 78 Md. 42; *Drayton v. Grimke*, Bail Eq. (S. C.) 392; *Robinson v. Ostendorff*, 38 S. C. 66; *Blakemore v. Kimmons*, 8 Baxt. 470; *Green v. Davidson*, 4 Baxt. 488; *Owens v. Cowan*, 7 B. Mon. 152; *Gulley v. Prather*, 7 Bush, 167; *Shields v. Smith*, 8 Bush, 601; *Peebles v. Watts*, 9 Dana, 103¹; *Steel v. Moxley*, 9 Dana, 139; *Schroeder v. Wilcox*, 39 Neb. 136; *Green v. Russell*, 103 Mich. 638; *Farwell v. Jacobs*, 4 Mass. 634; *Blake v. Dexter*, 12 Cush. 559; *Putnam v. Story*, 132 Mass. 212; *Warden v. Richards*, 11 Gray, 277; *Parker v. Sears*, 117 Mass. 521; *Dilworth v. Rice*, 48 Mo. 124; *Evans v. Blackiston*, 66 Mo. 437.)

M. L. Ward, and E. W. Peterson, for Respondent.

TEMPLE, J.—Plaintiff's testator resided in Minnesota up to the time of his death, and in that state made his will January 31, 1889. He died February 3, 1899. The will was duly probated in Minnesota and afterward was proven, as provided by law in reference to foreign wills, in the superior court of San Diego county, and admitted to probate, and letters of administration with the will annexed were issued to plaintiff, who in due time qualified. Thereafter plaintiff, as such administrator, not having obtained an order of sale, entered into a contract with defendant, whereby he agreed to sell, and defendant agreed to buy, certain real estate belonging to the estate, situated in the county of San Diego. The sale was duly reported to and confirmed by the probate court of that county and the proper decrees were entered and recorded. Thereafter a deed in due form was executed and tendered to the defendant, and demand made for the balance of the purchase money, according to the contract of sale. Defend-

ant refused to accept the deed and title or to pay, and this suit is brought to recover the purchase money still unpaid.

Defendant demurred to the complaint, on the ground that it appears upon its face "that plaintiff has no authority under the provisions and terms of the will of decedent, as set forth in said complaint, to sell or convey the property, or any portion thereof, described in the complaint." This presents the only question discussed on this appeal.

The will provided for the payment of all just debts, and gave all the property of the testator, wherever situate, to the same persons and in the same proportions as his estate would descend under the laws of Minnesota, and then follows the clause material here, to wit: "I hereby nominate, as the executor of this will, George W. Yates, on condition that he make no charge for his services as such executor; and I hereby authorize by said executor to sell, convey, or lease any of my estate for such prices and upon such terms he may think best, hereby requesting that my said executor be not required to give any bonds for the performance of his duties as such executor." This constitutes the entire will.

It is averred that the statutes of Minnesota contain the following provisions: "Every person appointed administrator with the will annexed shall, before entering upon the execution of his trust, give bond to the judge of probate, in the same manner and with the same conditions as is required of an executor, and shall proceed in all things to execute the trust in like manner as an executor is required to do; and whenever, by the terms of a will, the person (or persons) therein named as executor or executrix is empowered to sell and convey real estate, an administrator with such will annexed, appointed to execute the same, shall have the same power to sell and convey real estate that the person (or persons) named therein as executor or executrix could have had in executing said will. When all the executors appointed in a will are not authorized, according to the provisions of this chapter, to act as such, such as are authorized shall have the same authority to perform every act, and discharge every trust, required and allowed by the will; and their acts shall be as valid and effectual for every purpose as if all were authorized and acted together; and administrators with the will

annexed shall have the same authority to perform every act and discharge every trust as the executor named in the will would have had, and their acts shall be as valid and effectual for every purpose."

The testator died seised of a large estate, consisting of real and personal property, situated in many different states and territories, to wit, Minnesota, California, Washington, Texas, territory of New Mexico, and in the republic of Mexico. There are more than one hundred devisees, living in various states of the Union, and elsewhere. Judgment for defendant was entered upon the demurrer, and plaintiff appeals.

I do not doubt that a suit of this character may be maintained, although our probate law provides a special remedy in such cases. The property might have been resold and the present purchaser held responsible if, on a second sale, enough was not realized to pay costs and the amount of the present bid. That remedy is not exclusive, and in some possible case might not be adequate. The purchaser might also have appealed from the order of the probate court confirming the sale, but did not. It is not contended here that the order of confirmation will conclude the purchaser as a judgment to which he was a party. Whether it would have any effect upon the purchaser has not been considered, and is not here determined.

Our statute provides that: "Administrators with the will annexed have the same authority over estates which executors named in the will would have, and their acts are as effectual for all purposes." (Code Civ. Proc., sec. 1326.) This statute was quite elaborately considered in *Kidwell v. Brummagim*, 32 Cal. 436, upon which case appellant very greatly relies. The case is very instructive, principally because no reason given for sustaining the power of the administrator in that case exists here.

The name of the executor in the *Kidwell* case does not appear in the clause or paragraph in which the power to sell is conferred upon him. "The executor of this, my last will and testament, will, within two years after my decease, sell." This circumstance has been deemed of importance, as indicating that power was conferred upon the executor as such,

and not to the person by name as one in whom the testator had special confidence. In the present will the testator in one sentence says, omitting unnecessary words: "I nominate as executor of my will, George W. Yates, on condition that he make no charge for his services, and hereby authorize my said executor to sell, convey or lease any of my estate for such prices and upon such terms as he may think best, and he is not required to give bonds."

2. The power to sell in the Kidwell case was not a mere naked power. It was coupled with trusts. It was to raise money to pay specific legacies, practically for distribution, which is plainly a purpose within the usual scope and function of an executor. In the present case there is no executorial purpose. Clearly, it was not for the purpose of distribution, for he directs his property, wherever situated, to descend according to the laws of Minnesota; and, besides, if it was to be created as personality and distributed in Minnesota, the direction to sell would have been mandatory and not left in the discretion of his executor to sell or lease.

3. And this brings us to the most obvious difference between the case in 32 California and the case in hand. There the sale was mandatory. All of his real estate was to be sold for the purpose of distribution. Here the executor is named and authorized to sell, convey, or lease, for such prices and upon such terms as he may think best, any portion of his estate. As it is the duty of all trustees to execute their trust in the manner which will best subserve the interest of their beneficiaries, plainly the executor was required to sell, or to refrain from selling, as in his judgment would be best for the estate. To some extent the executor is manager of the estate in the interest of the devisees, and a personal trust and confidence is reposed in him, and power given him beyond the usual scope and functions of executors. As a general rule, it has been held that such powers do not pass to the administrator with the will annexed. The rule as applied to statutes similar to ours is stated by Woerner (2 Woerner's American Administration, sec. 341): "They confer upon the administrator with the will annexed all powers given to the executor for the purpose of paying debts or legacies, or both,

and especially when there is an equitable conversion of land into money for the purposes of such payment or distribution, or where the power of sale is imperative and does not grow out of a personal discretion confided to an individual; but no discretionary trust or power conferred upon an executor or for a special purpose collateral to the ordinary duties of an executor or administrator, or indicating a special confidence reposed in the individual." This proposition is sustained by numerous cases cited, and particularly by the case of *Mott v. Ackerman*, 92 N. Y. 539, where previous decisions in that state are modified and the rule stated substantially as above.

It was formerly held that as land was not testamentary assets, available for payment of debts, when power to sell any portion of it was given to the executor, even to pay debts or legacies, the will simply made the named executor trustee. He either took the property in trust to sell, or was the donee of a power in trust, and in either case could exercise the trust or sell under the power, though he did not qualify as executor. And, accordingly, it was held, even under a statute somewhat similar to ours, that the power did not vest in an administrator with the will annexed. (*Conklin v. Egerton*, 21 Wend. 429.)

In that case the matter is argued at great length and with much learning by Judge Cowen, who holds that whether land be devised to the executors to sell, or the devise is that they shall sell, the power is not in them as executors, but as trustees, and they may execute the power whether they qualify or not. Many American cases are cited to the same effect, and this was evidently the doctrine of the English courts (*Sugden on Powers*, 139.)

This view of the matter was never tenable in this state, where real and personal property descend by the same rule, and the power of administrators and executors extends alike to both. It has not been generally adopted in other states, and has been practically reversed in New York by the case of *Mott v. Ackerman*, *supra* and other cases. The trend of decision now is to construe powers vested in an executor as held *virtute officii* when it is possible to do so. Still the rule quoted from *Woerner* is universally recognized. The power

to pass to the administrator *cum testamento annexo* must be for an administrative purpose, and not to execute a collateral trust.

The trouble with the plaintiff's case is, however, that the sale authorized is at the discretion of the named donee of the power to make or not, and the sale is not for an administrative purpose. We cannot presume that the sale was to pay debts. Such a presumption has been indulged in favor of creditors where real estate cannot be resorted to for payment of debts, except as provided in a will. Nor does the fact that the estate of the testator, both real and personal, is distributed as one fund raise any presumption of an equitable conversion of land into money, as was held in *Potts v. Brene-man*, 182 Pa. St. 295. Whatever presumption could arise in Pennsylvania from the fact that a testator bequeathed his estate as one fund, making no distinction between personal property and land, it is of no significance here, where both species of property descend by the same rule, and the executor and the probate court have the same control over each.

Appellant cites numerous cases which he contends sustain the proposition that the power will pass to the administrator even when it is discretionary. When, although the direction to sell is imperative, discretion is given as to the time of sale, or the terms, or price, undoubtedly the power passes to the administrator *cum testamento annexo*. Many cases upon this subject are cited in a note to *Giberson v. Giberson*, 43 N. J. Eq. 117.

Among the numerous cases cited I find none which give any color to the contention of appellant, except *Shields v. Smith*, 8 Bush, 601, and that case, when carefully examined, is of little, if any, value as an authority.

It was provided by a statute of Kentucky that in the case of the death of one of several executors the survivor "may sell the land which the will directs or devises to the executor, or to another person, to be sold, or gives discretionary power to sell," etc. By a subsequent section it was enacted, in substance, that an administrator with the will annexed shall possess all the power and authority given to the executors therein named, or any of them. The court construed this act to mean that the administrator *cum testamento annexo* had

all the power conferred upon executors by the previous section. Thus explained, the Kentucky cases cannot be said to be at variance with the current of authorities upon the subject. We cannot consider the provisions of the statute of Minnesota incorporated into the will, except as to such powers as are within the usual scope of an administration of an estate by an executor; nor by such construction can we provide a trustee to execute a power given by the testator to a named person because of peculiar confidence reposed in him.

Notwithstanding the *dicta* in many cases, it is manifest that such statutes cannot be considered in all cases as though the language had been actually inserted by the testator in his will. Had the language been in the will it would naturally imply that the administrator with the will annexed should act as trustee of the testator even in collateral trusts. Under the rule above cited the statute has reference only to such trusts as are properly executorial.

The judgment is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion on the 2d of November, 1900:

BEATTY, C. J.—I dissent from the order denying a rehearing, and from the judgment.

I think it clear that under the statute of Minnesota, quoted in the opinion of the court, an administrator with the will annexed would, in that state, have had the same power of sale that was conferred upon the executor named in the will; and I think the authorities cited in the briefs sustain the proposition that the intention of the testator is to be gathered from the terms of the will as affected by the law of his domicile. That is to say, this testator must have intended that, in case of the refusal or failure of his nominee to act as executor, or of his ceasing to act, the administrator *cum testamento annexo* should exercise the power of sale, and that not only in Minnesota, but wherever his property was situated.

[L. A. No. 723. Department Two.—October 2, 1900.]

**GEORGE HOLLOWAY, Appellant, v. PASADENA AND
PACIFIC RAILWAY COMPANY, Respondent.**

NEGLIGENCE—JOLTING OF ELECTRIC-CAR—DEFECTIVE CATTLE-GUARD.—In an action for damages for injury by being thrown from an electric-car, evidence tending to show that the track was not in proper repair at a cattle-guard rapidly crossed by the car, which by a lurch or jerk threw plaintiff from the car to his injury, is sufficient to enable the jury to infer negligence; and it is error for the court to take the case from the jury.

ID.—CONTRIBUTORY NEGLIGENCE—CROWDED CAR—SITTING UPON PLATFORM—QUESTIONS FOR JURY.—It is not contributory negligence, as matter of law, for the plaintiff to sit upon the platform of a crowded car, with his feet upon the step, from which position he was jerked to the ground to his injury; but the question is for the jury. It is for the jury to determine whether or not the defendant, by crowding the car, caused the plaintiff to take such seat, and whether or not the seat was such as to endanger the life or safety of the plaintiff, provided the defendant exercised due care.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Walter Van Dyke, Judge.

The facts are stated in the opinion of the court.

Simpson & Willett, for Appellant.

John D. Pope, for Respondent.

THE COURT.—This action was brought by plaintiff to obtain a judgment against defendant for damages received by plaintiff in falling or being thrown off of one of defendant's electric-cars while said car was in motion.

At the close of the evidence the court directed the jury to return a verdict for the defendant, and upon the verdict thus returned judgment was entered. This appeal is from the judgment and from the order denying plaintiff's motion for a new trial. It appears from the evidence that on the twenty-fifth day of November, 1897, the plaintiff was returning from Santa Monica to Los Angeles on one of defendant's

cars. The car was crowded, and plaintiff was seated on the front platform with his feet resting on the step. As the car ran over a certain cattle-guard near Rosedale Cemetery, on defendant's track, plaintiff fell or was thrown from the car and under it, so that one foot was crushed and the other was badly injured. Plaintiff claims that his feet were caught by timbers extending upward from the trench or portion of the cattle-guard under the track. The timbers or steps forming a portion of the cattle-guard were four and a half inches below the step of the car. It is claimed in appellant's brief that there was substantial evidence of negligence on the part of defendant, and that it was the duty of the court to have allowed the case to go to the jury. In the complaint it is alleged that defendant was negligent in not providing a sufficient number of cars for the transportation of its passengers, in the operation of the cars upon which plaintiff was riding, in the construction of its cattle-guards, and in the construction and maintenance of its road. The evidence seems to have been principally confined to the allegation as to negligence in the maintenance of the road. The negligence in this respect is claimed to be that defendant's track had a loose joint or connection of the rails just west of the cattle-guard, so that a car passing over the joint would receive a severe jolt. The testimony on behalf of plaintiff was in substance as follows: The witness Collins testified: "For about two feet under, directly under where the joint of the rails were put each way, the ground was broken, so that when one would stand on the rail you could see the rail bend up and down. The car was going at a rapid gait, . . . I should judge twenty miles an hour; all at once there was a severe jolt, and I felt Mr. Holloway's body sort of give a lurch back. He was pulled off the car and he went with—well, without any resistance. . . . In connection with the jolt of the car there seemed to be a lurch sideways and a downward movement of the car."

The witness Allen testified "that the joint was about three feet and eight inches west of the cattle-guard; that at this place the rails of the track did not meet by nine-sixteenths of an inch, and underneath the joint the ground was broken so

that the weight of a man would cause the rail to move up and down, and that the track at this point was not in a safe and proper condition for travel. That there was a depression of five-eighths of an inch at this point distributed over a space of about eight feet. That the effect on a car passing that point at the speed of fifteen or twenty miles an hour would be to cause a jolt, and that the tendency of the car would be to go downward."

The witness Brunson testified "that the car was running very fast. It seemed to be behind time and trying to make up, and the car gave a jolt and off he went."

The witness Greely testified "that the seats were all full of people and the aisles of the car were full of people standing. . . . That he noticed the jolt."

The witness Weyrick testified that the rails did not come quite together at the joint, that the ground was loose beneath the rail so that when you stepped on it the rail would give a little.

Plaintiff testified that he boarded the car at Santa Monica and obtained a seat. That he gave up his seat to a lady and sat down on the front platform, and that there were no seats on the platform for passengers. That his feet were on the step of the platform. That just prior to the time he went off the car "the car seemed to give a kind of a lunge, swinging the upper part of my body backward, and my feet went up. Something struck my right foot right hard and pulled me off the car. I fell off, the car ran over my feet."

Negligence of defendant was the basis of the plaintiff's cause of action and of his right to recover. It was the province of the judge to determine whether or not the evidence offered by plaintiff had any legal tendency to establish negligence, and it was for the jury to say, after weighing and considering all the evidence, whether or not the negligence had been sufficiently proven. If the evidence on the part of the plaintiff was such that the jury would have the right to infer negligence therefrom, the court did not have the right to usurp the functions of the jury and take the case from them. (*Bush v. Barnett*, 96 Cal. 202; *McCurrie v. Southern Pac. Co.*, 122 Cal. 560.)

In this case we think the evidence was such that the case should, upon proper instructions, have been sent to the jury. The evidence tended to show that the track was not in proper repair and that the plaintiff was thrown off the car by reason of the car giving a lurch or jerk as it passed over the defective joint. The evidence was not the most satisfactory, and it may be that in view of the evidence produced by defendant that the jury would not have found that the track was out of repair, or that the defendant was guilty of negligence. But it was the peculiar function of the jury to pass upon these questions. If the evidence were such that the jury would have no right to infer negligence, then the court would have been justified in taking the case from it. The test is this: Would the evidence on the part of the plaintiff be sufficient to sustain a verdict in his favor if such verdict had been rendered? Applying this test we think the evidence in the record would be sufficient to sustain a verdict for plaintiff. It is claimed that the evidence on the part of plaintiff shows that he was guilty of contributory negligence in taking a seat on the steps of the front platform. The evidence is such that it gives much color to defendant's contention, but we cannot say as a matter of law that the evidence shows such contributory negligence on the part of plaintiff as to preclude his recovery. The car was crowded with passengers. The plaintiff had taken a seat on the steps. Whether or not the defendant, by crowding its car, caused plaintiff to take such seat, and whether or not the seat was such as to endanger the life or safety of plaintiff, provided the defendant exercised due and proper care, were questions for the jury. If different inferences might be drawn from the evidence as to whether or not the plaintiff was guilty of contributory negligence, it was the province of the jury to determine such questions and draw such inferences.

The judgment and order are reversed and the cause remanded for a new trial.

[L. A. No. 647. Department Two.—October 2, 1900.]

MARY K. BARTLETT, Respondent, v. MARY E. MACKEY, Appellant.

PETITION—APPEAL FROM INTERLOCUTORY JUDGMENT.—An appeal from an interlocutory judgment in an action for partition, taken more than sixty days after the entry of the interlocutory judgment, is too late, and must be disregarded.

ID.—SALE—MATERIAL INJURY FROM PARTITION—PLEADING—EVIDENCE.—It is not essential to aver in the complaint that partition cannot be made without material injury and great prejudice to the owners, to justify the admission of evidence to that effect, and to warrant an order of sale of the property.

ID.—SUPPORT OF FINDING—"GREAT PREJUDICE TO OWNERS."—A finding that "partition cannot be made without great prejudice to the owners," is sufficiently supported by the testimony of three witnesses, without contradiction, that it would be injurious to both parties to partition the property, together with proof of the situation of the land sought to be partitioned indicating the same thing.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

Charles Lantz, and H. C. Dillon, for Appellant.

Simpson & Willett, for Respondent.

THE COURT.—This action is for a partition of two lots in the city of Pasadena. The defendant appeals from an interlocutory judgment in plaintiff's favor and from an order denying a new trial.

The appeal from the judgment was taken more than sixty days after the same was entered, and must therefore be disregarded. (Code Civ. Proc., sec. 939, subd. 3.) The appeal from the order denying a new trial is left for consideration, and we will dispose of the questions properly arising thereon, omitting all those matters that can be determined only on appeal from the judgment. (*Thompson v. Los Angeles*, 125 Cal. 270.)

Appellant objected to the testimony of each of three witnesses to the effect that it would be injurious to both parties to partition the property. The ground of his objection, as stated on this appeal (though it was not so stated at the trial), is "the absence of allegations in the complaint that said property could not be partitioned without great prejudice to the rights of the owners." The complaint is devoid of the allegation as claimed, but the prayer of the complaint contains the following: "Wherefore the said plaintiff prays judgment: . . . 2. That a partition of the said real property be made according to the rights of the respective parties, or, if a partition cannot be made without material injury and great prejudice to the owners of those rights, then that said premises be sold," etc. Section 763 of the Code of Civil Procedure provides: "If it be alleged in the complaint and established by evidence, or if appear by the evidence without such allegation in the complaint to the satisfaction of the court, that the property or any part of it is so situated that partition thereof cannot be made without great prejudice to the owners, the court may order a sale thereof." This statute seems to contemplate that the court may investigate the question as to whether a sale is requisite to avoid great prejudice to the owners even in the absence of any allegation in the complaint to that effect.

In *De Uprey v. De Uprey*, 27 Cal. 330,¹ there was a demurrer to the complaint, and in disposing of it Sanderson, C. J., said: "The only ground urged in support of the demurrer is that the complaint contents itself with the general allegation that the premises cannot be divided by metes and bounds without prejudice, and does not state the facts showing why such a partition could not be made. A complete answer to this is found in the fact that the manner in which the partition is to be made constitutes no part of the cause of action, but is merely a part of the relief. While it is proper and perhaps advisable to ask for a particular mode of partition—there being two provided by the statute—and to that end allege the facts upon which the plaintiff relies for the particular mode which he seeks, yet this is not indispensable, and a complaint which is silent upon the subject is good."

¹ 87 Am. Dec. 81.

We are clearly of the opinion that the objection was properly overruled.

It is objected that the evidence is insufficient to sustain the finding that partition of the premises cannot be made without great prejudice to the owners.

It was testified by three witnesses, without contradiction, that it would be injurious to both parties to partition the property. In addition to this, it is shown that the land sought to be partitioned is fifty-one feet wide and three hundred and five feet long; that the ends of it front on Colorado and Union streets, Colorado being the principal business street of Pasadena; that along its western side runs a narrow street traversed by the Southern California Railway. On its eastern border there is no street. The question of "great prejudice to the owners" was one of fact to be determined by the trial court, and in view of the foregoing evidence we see no cause to interfere with the finding. (*De Uprey v. De Uprey, supra.*)

The other points urged for a reversal are not of sufficient importance to require special notice.

The judgment and order appealed from are affirmed.

[S. F. No. 2270. In Bank.—October 2, 1900.]

J. F. KERR, Petitioner, v. SUPERIOR COURT, Respondent.

MANDAMUS—ACCUSATIONS AGAINST DIRECTORS OF IRRIGATION DISTRICT—

REFUSAL TO ISSUE CITATION.—*Mandamus* will not lie to compel a superior court which has refused to issue a citation upon an accusation made under the provisions of section 772 of the Penal Code against a director of an irrigation district, charging him with neglect to perform his official duty as such director, "to issue said citation," and to proceed with the hearing of the same. [Temple, J., and Beatty, C. J., dissenting.]

ID.—JUDICIAL DISCRETION—FRUITLESS RESULT—FINAL ACTION.—*Mandamus* will not lie to control judicial discretion nor to compel a court to exercise its discretion in a particular manner, nor to control the result of its action, nor to compel it to grant rather than to refuse a motion or request, nor to compel action, the results of which would be vain and fruitless, nor to disturb the final action of a court from which there is no appeal.

PETITION for *mandamus* from the Supreme Court to the Superior Court of Stanislaus County. J. K. Law, Judge.

The facts are stated in the opinion of the court.

L. L. Dennett, C. A. Stonesifer, and W. H. Hatton, for Petitioner.

Rodgers, Paterson & Slack, and C. W. Eastin, for Respondent.

McFARLAND, J.—This is an original petition here for a writ of *mandamus* to compel the superior court of the county of Stanislaus to take certain action prayed for in the petition. An alternative writ issued, and afterward a demurrer to the petition was interposed and the case was submitted on the demurrer.

The petition sets forth that on March 10, 1900, petitioner presented to said superior court, respondent herein, a written verified accusation in which it was alleged that one Baker, a director of the Modesto Irrigation District, had refused and neglected to perform his official duty as such director, and was so refusing and neglecting it; that "at said time the said plaintiff above named, by his attorneys, demanded of the said court that said court cite the said defendant, C. C. Baker, to appear before the said court, at a time not more than ten nor less than five days from the time said accusation was presented, to answer said accusation; and that said court refused to issue said citation," or to take any further action upon the accusation. The prayer of the petition is that a writ issue requiring respondent "to issue said citation" and to proceed with the hearing of the same. The accusation was based upon the provisions of section 772 of the Penal Code.

It is not necessary for us here to discuss the constitutionality of said section 772, or the validity under it of any process not in the name of "The people of the state of California," or the question whether a person can be punished criminally by "removal from office," and a fine of five hundred dollars, without a jury trial, or any of the other objections taken by counsel for respondent to the validity of said section; because, in our opinion, the petition does not present a case which calls for the exercise of the writ of *mandamus*.

It is the general rule that *mandamus* does not lie to control the discretion of a court or judicial officer; and, whatever exceptions there may be to this general rule, it is clear that a court cannot be made by *mandamus* to exercise its discretion in a particular manner. (High's Extraordinary Legal Remedies, sec. 156; *Francisco v. Manhattan etc. Co.*, 36 Cal. 286; *Strong v. Grant*, 99 Cal. 100; *Lewis v. Barclay*, 35 Cal. 213; *People v. Weston*, 28 Cal. 640.) It is also a rule that a court will not do the vain and fruitless thing of issuing a writ where nothing can be accomplished by it. (High's Extraordinary Legal Remedies, sec. 14; *Boyne v. Ryan*, 100 Cal. 265.) We think that either of the above-stated rules precludes the rightful issuance of the writ in the case at bar.

A court can be compelled to act, but, having acted, its act cannot be reviewed on *mandamus*; or, as the rule is stated in *Shine v. Kentucky Cent. R. R. Co.*, 85 Ky. 177: "*Mandamus* will lie to set a court in motion, but not to control the result." Whether or not a court has acted within the meaning of this rule depends upon the nature of the proceedings before it, the method by which its action is solicited, and the manner in which the action is to be expressed. A court may act as efficiently by refusing as by granting a motion or request. Ordinarily, in civil cases, the judge has nothing to do with bringing a party into court; that is accomplished by process issued by a ministerial officer, and the judge has no opportunity of exercising his discretion to determine, in the first instance, whether or not the process should issue. When his attention is first called to the case he finds the party already in court—brought there by means over which he had theretofore no control; and, if he determines that the case is improperly there, he must express his determination by some affirmative action, such as sustaining a demurrer, or dismissing the action. The same is true in criminal actions, at least in the higher courts, where cases are brought into court by previous acts of some other tribunals, such as grand juries and committing magistrates; and, as to magistrates, no one would claim that they could be compelled by *mandamus* to issue warrants of arrest. (See High's Extraordinary Legal Remedies, sec. 257; *United*

States v. Lawrence, 3 Dall. 42.) Now, under section 772 of the Penal Code, the party against whom the accusation is made can be brought into court only by a citation issued by the court itself; and the court must, in the first instance, exercise its discretion in determining whether or not a citation should issue. Certainly, no one would seriously claim that under this section "any person" can, by any sort of an instrument which he chooses to call an "accusation," compel a court to put a citizen on trial for a criminal offense. The court must first judicially determine whether a citation should issue upon the accusation; and, when it has refused to issue the citation, it has acted on the matter before it. How else could it act if its judicial determination be that the citation should not issue? And having thus acted—no matter how erroneously—it cannot be compelled by *mandamus* to change its action and exercise its discretion in a different manner.

Moreover, a mandate from this court to the respondent to do the formal act of issuing a citation would accomplish nothing; for while this court could compel the respondent, against its will and contrary to its judgment, to issue the citation, it could not prevent respondent from dismissing the proceeding, or compel it to reinstate the same after such dismissal. (High's Extraordinary Legal Remedies, sec. 154, and cases cited to note 2 on pages 172; *People v. Weston*, *supra*; *Lewis v. Barclay*, *supra*; *People v. Sexton*, 24 Cal. 78; *Sankey v. Levy*, 69 Cal. 244.) In this respect the case at bar is much like that of *Boyne v. Ryan*, *supra*, where it was held that a writ of *mandamus* would not be issued to compel a district attorney, against his will and judgment to commence a certain action even though he ought to have done so, because it "would be an idle thing in the absence of power to compel him to prosecute it to final judgment." It was there said as follows: "A court will not do a vain or fruitless thing, or undertake by *mandamus* what cannot be accomplished." As was said by Chancellor Kent in *Trustees etc. v. Nicoll*, 3 Johns. 598: "It has hitherto been considered as a settled principle that a court will not undertake to exercise power but when they exercise it to some purpose." Moreover, it has been held that there is no appeal from a judgment rendered upon an accusation under section 772—

at least by the accuser. (*In re Curtis*, 108 Cal. 661, and cases there cited.) Therefore, query, Is not the case at bar within the rule declared in *Lewis v. Barclay*, *supra*, *Fairchild v. Wall*, 93 Cal. 401, and *Wood v. Strother*, 76 Cal. 545,¹ that where the determination of the tribunal or officer is final it cannot be disturbed either on *mandamus* or in any other way?

It is to be remembered that where there is probable cause for believing that a public officer has been guilty of misconduct in office an ample remedy is afforded the people by section 758 and the sections which immediately follow it, under which he may be indicted and have a fair trial before a jury.

The demurrer is sustained and the proceeding is dismissed.

Garoutte, J., Van Dyke, J., Harrison, J., and Henshaw, J., concurred.

TEMPLE, J., dissenting.—I dissent. The conclusion that a court exercises its jurisdiction by refusing to act at all depends upon rather refined reasoning. If sound, I do not see how this court can ever compel judicial action. If the question be a judicial puzzle, it should be resolved in favor of jurisdiction of this court. The contrary holding would deprive parties of a remedy which, in my judgment, is plainly guaranteed by law.

And I think the remedy was provided for these very cases, in which the inferior court concludes that a case has not been made by a complaint which calls for or justifies the exercise of its jurisdiction. It is not to be supposed that the judge acts perversely and refuses to perform a duty which is plain. The usual case in which a judge refuses to act must be when he concludes that a case has not been made calling for such action. It matters not why the inferior tribunal refuses to act. If its duty to act is manifest, action should be compelled. According to the principal opinion, the aggrieved party has no remedy. If so, that solution of the question should be preferred which will afford a remedy. Such was the ruling of this court on this precise question in *Temple v. Superior Court*, 70 Cal. 211.

Beatty, C. J., concurred in the dissenting opinion.

¹ 9 Am. St. Rep. 249.

[S. F. No. 1508. Department One.—October 3, 1900.]

C. E. WHITNEY & CO., Appellant, v. SELLERS' COMMISSION COMPANY, Respondent.

ACTION AGAINST CORPORATION—PLACE OF TRIAL—PRINCIPAL PLACE OF BUSINESS—CONTRACT MADE IN COUNTY OF VENUE.—In an action against a corporation upon a contract made in the county of the venue, the corporation is not entitled to change the place of trial to another county in which it has its principal place of business.

ID.—ORDER CHANGING PLACE OF TRIAL—REVERSAL UPON APPEAL—AFFIDAVITS WITHOUT SUBSTANTIAL CONFLICT—KNOWLEDGE OF AFFIDAVANTS.—An order changing the place of trial to the county where the corporation defendant has its principal place of business will be reversed upon appeal, where the affidavits show without substantial conflict that the contract sued upon was made in the county of the venue. An affidavit by one having no knowledge of the place where the contract was made does not substantially conflict with the positive affidavits of persons who made the contract that it was made in the county of the venue.

APPEAL from an order of the Superior Court of the City and County of San Francisco changing the place of trial of an action. Edward A. Belcher, Judge.

The facts are stated in the opinion of the court.

Myrick & Deering, for Appellant.

The plaintiff was entitled to sue where the contract was made, and the defendant had no right to change the place of trial to the place of residence. (Const., art. XII, sec. 16; *Griffin etc. Co. v. Magnolia etc. Co.*, 107 Cal. 378, 381; *Trezevant v. Strong Co.*, 102 Cal. 47, 49; *Brady v. Times-Mirror Co.*, 106 Cal. 56, 58.) The affidavits are documentary, and this court can pass upon their relative merit. (*Tuller v. Arnold*, 93 Cal. 166; *Wilson v. Cross*, 33 Cal. 69; *Lander v. Beers*, 48 Cal. 547; *Reynolds v. Snow*, 67 Cal. 499.)

McGowan & Squire, for Respondent.

There being a conflict in the evidence as to the place where the contract was made, this court will not disturb the con-

clusion of the court below. (*Bowers v. Modoc Land etc. Co.*, 117 Cal. 50, 53; *Hastings v. Keller*, 69 Cal. 606; *Daniels v Church*, 96 Cal. 13; *Clanton v. Ruffner*, 78 Cal. 268.)

GAROUTTE, J.—This appeal is prosecuted from an order granting to defendants a change of place of trial to Humboldt county. The motion was made upon the ground that the defendant resided in that county. Plaintiff replied to the motion by affidavits to the effect that the contract sued upon was made in the city and county of San Francisco. Notwithstanding the residence of defendant may have been located in Humboldt county, still if the contract was made in the city and county of San Francisco, the fact of residence in another county did not justify the court in granting a change of venue. (*Trezevant v. Strong Co.*, 102 Cal. 47.)

It is now claimed by respondent that upon the affidavits introduced at the hearing a substantial conflict in the evidence arose as to where the contract was made. Upon careful examination of the evidence, the conflict relied upon is not apparent. The action is for an indebtedness based upon an express contract. A. L. Whitney swears that as the agent of plaintiff, in the office of plaintiff in the city and county of San Francisco, he made the contract sued upon, with one D. K. B. Sellers, who was then acting for and on behalf of defendant. D. K. B. Sellers swears that he was president of the defendant corporation at the time of the making of the contract set out in plaintiff's complaint, and that, acting for and on behalf of defendant, he entered into said contract with A. L. Whitney, who was then acting for plaintiff and that the contract was made in the city and county of San Francisco. The evidence of these two witnesses is very plain and positive, and goes squarely to the point. The only evidence offered by defendant even looking toward a contradiction of the evidence of Whitney and Sellers is the evidence of Everding, who testifies: "If defendant assumed, as set forth in the complaint, any of the indebtedness which was owed to it by D. K. B. Sellers, the same was assumed in the county of Humboldt, and not in the city and county of San Francisco." Everding, in this affidavit, makes no pretense of denying the statements of Whitney and Sellers

as to what occurred between them in the city and county of San Francisco in the making of the contract relied upon by plaintiff. It is evident he was not present at the time and knew nothing about it of his own knowledge. The statement we have taken from the affidavit of Everding is not sufficient to create a conflict with the evidence of Whitney and Sellers, and for this reason we find no substantial conflict in the evidence, and the motion for a change of venue should have been denied by the trial court.

For the foregoing reasons the order is reversed and the cause remanded.

Van Dyke, J., and Harrison, J., concurred.

[Sac. No. 860. Department One.—October 3, 1900.]

JAMES R. BLACK, Appellant, v. DAISY HILLIKER, Respondent.

CLAIM AND DELIVERY—FINDINGS—AGGREGATE VALUE OF PROPERTY.—In an action of claim and delivery, where the complaint alleged only the aggregate value of all the articles of property claimed, and they were returned to the defendant, in whose favor judgment was rendered, it was not necessary for the court to find the value of each article of the property claimed, but a finding of their aggregate value was sufficient.

ID.—OWNERSHIP OF DEFENDANT—CONFLICTING EVIDENCE—CHOICE OF ARTICLES BY PLAINTIFF.—A finding that the defendant was the owner and entitled to possession of the property claimed and demanded by the plaintiff, made upon conflicting evidence, cannot be reviewed upon appeal; and in view of such finding, the plaintiff has no right to choose to retain any part of the articles replevied and to pay to defendant the value thereof.

NEW TRIAL—SETTLEMENT OF STATEMENT—ALLOWANCE OF AMENDMENTS—FAILURE TO GIVE NOTICE—JURISDICTION.—The failure of the party moving for a new trial to give notice of the settlement of the statement and proposed amendments thereto, or to give express notice of his adoption or rejection of the proposed amendments, operates as an admission that the amendments are to be allowed, and cannot deprive the judge of jurisdiction to settle the statement as so amended, upon the basis of the adoption of the proposed amendments by the moving party.

ID.—RECOVERY BY DEFENDANT—RETURN OF PROPERTY—DAMAGES.—

Where the property claimed was not delivered to the plaintiff, but returned to the defendant, and there is no proof that the defendant expended any time or money in the pursuit of the property, the defendant recovering judgment is not entitled to recover any damages either for the taking and withholding of the property under section 667 of the Code of Civil Procedure, nor for the conversion thereof under section 3336 of the Civil Code. Both of those sections are inapplicable in such case.

ID.—COUNSEL FEES FOR DEFENSE OF ACTION.—The defendant is not entitled to recover as damages the services rendered by counsel to appear for and represent the defendant generally in defending the action.

APPEAL from a judgment of the Superior Court of Yolo County and from an order denying a new trial. A. J. Buckles, Judge presiding.

The facts are stated in the opinion of the court.

• R. Clark, and H. D. Gill, for Appellant.

Byron Ball, and Hudson Grant, for Respondent.

HARRISON, J.—Action of claim and delivery. The plaintiff brought this action to recover from the defendant the possession of certain personal property or its value. Upon the commencement of the action, under his direction, the property was taken by the sheriff from the possession of the defendant, and within five days thereafter and before its delivery to the plaintiff, the sheriff, upon the execution to him by the defendant of a proper undertaking therefor, returned the property to her. In her answer to the complaint defendant denied its allegations and alleged ownership in herself of the property and the right to its possession. The cause was tried by the court without a jury and judgment rendered in favor of the defendant, from which, and an order denying a new trial, the plaintiff has appealed.

1. The objection on the part of the respondent to any consideration of the statement of the case must be overruled. The failure of the plaintiff to present the statement to the judge for settlement within ten days after the receipt from

the defendant of her proposed amendments did not deprive the judge of the power to settle the statement as so amended. (*Pendergrass v. Cross*, 73 Cal. 475.) It does not appear from the record that the plaintiff ever gave to the defendant any notice whether her amendments were adopted or rejected, until after the defendant's counsel had himself taken steps for its settlement. It was not necessary for him to give notice that he adopted her amendments, and his failure to give any notice in reference thereto was of itself an admission that they were to be allowed. The subsequent settlement of the statement by the judge, by the adoption of the defendant's proposed amendments, was in all respects equivalent to the procedure authorized in section 659 of the Code of Civil Procedure, when the proposed amendments are adopted by the moving party; and it could have been so settled without any express notice from the plaintiff that he adopted the amendments.

2. The finding of the court that the defendant was the owner and entitled to the possession of the property was made upon the consideration of conflicting evidence, and cannot be reviewed. It was not necessary for the court to find the value of each article of property. The plaintiff had alleged in his complaint only the aggregate value of all the articles, and, as all of the property was returned to the defendant, the finding of the court of its aggregate value was all that was required. The claim of the appellant that he had the right to retain such articles as he might choose, and pay to the defendant the value thereof, notwithstanding the court found that she was the owner, cannot be sustained upon any principle of law.

The claim of the appellant that the judgment awards to the defendant certain articles of property for which the plaintiff did not sue is not sustained by the record. The court, after enumerating the articles of which it finds the defendant to be the owner, also finds that "the said property is the property claimed and demanded by the plaintiff," which was taken from her by the sheriff at the instance of the plaintiff.

3. The court found that the defendant had employed attorneys to appear for and represent her in the action, and had become liable to them for their services so rendered in the sum of three hundred dollars. It also found that she

had been damaged in the sum of three hundred dollars, by reason of the wrongful taking of the property from her, and in addition to giving judgment for the possession of the property, awarded a judgment in her favor against the plaintiff, for damages in the sum of three hundred dollars.

There was no evidence of any damage sustained by the defendant from the wrongful taking of the property, other than her liability for compensation to the attorneys employed by her in the action. Section 667 of the Code of Civil Procedure provides: "If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same." As the property was not delivered to the plaintiff, the provisions of this section have no application. Section 3336 of the Civil Code is also inapplicable, since there was no conversion of the property by the plaintiff, and the defendant did not show that she had expended any time or money in pursuit of the property. (*Murphy v. Mulgrew*, 102 Cal. 547.¹)

It is contrary to the general policy of the law that a plaintiff who is unsuccessful in his suit shall be mulcted in damages merely by reason of his failure to obtain a judgment. It is only in exceptional cases that the successful party in an action, either at law or in equity, is permitted to recover as a part of his damages the attorneys' fees paid by him. In *Asevado v. Orr*, 100 Cal. 293, we said: "The courts of the state are open to every citizen for the redress of his wrongs, and, unless he is at liberty to seek such redress without rendering himself liable in damages to the defendant in case he shall fail to establish his complaint, this right would, in many instances, be a barren privilege." In *Mitchell v. Hawley*, 79 Cal. 301, it was said: "The allowance of counsel fees in suits on injunction bonds, and in one or two other actions of a kindred character, is exceptional; and it should not be carried beyond the point to which former decisions have taken it." The rule thus stated has been strictly followed. (*Spooner v. Cady*, 44 Pac. Rep. 1018;

¹ 41 Am. St. Rep. 200.

San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 216; *Curtiss v. Bachman*, 110 Cal. 433.²) Even in cases of injunction the defendant is not permitted to recover, as part of his damages, the fees paid to his attorney for defending the action (*Bustamente v. Stewart*, 55 Cal. 115); and if it appear that the judgment was for services rendered generally in the case, he cannot recover therefor. (*Lambert v. Haskell*, 80 Cal. 611.) As the evidence and finding in the present case are that the employment of the attorneys by the defendant, and the services rendered by them, were "to appear for and represent her in the action," the court erred in awarding her damages for the value of the services so rendered.

The superior court is directed to modify its judgment by striking therefrom "the sum of three hundred dollars (\$300) damages" awarded to the defendant, and as so modified the judgment and order will stand affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[L. A. No. 625. Department Two.—October 3, 1900.]

EMMA H. WOODHAM, Appellant, v. W. S. ALLEN, Respondent.

ACTION FOR MONEY OBTAINED UNDER MENACE—THREATS OF CRIMINAL PROSECUTION—PLEADING—SUFFICIENCY OF COMPLAINT.—A complaint setting forth the extortion by defendant from plaintiff of merchandise and secured notes of the total value of four hundred dollars, through fear of threats of a criminal prosecution against the husband of the plaintiff for receiving stolen goods of that value, if not paid, and that the notes were paid by plaintiff under fear of the same threats, and that her said husband was not guilty of said offense, states a cause of action for the recovery of that amount so obtained by means of menace.

Id.—CAUSE OF ACTION IN TORT—AVERMENT OF NONPAYMENT NOT REQUIRED.—Such complaint states a cause of action in tort, and not *ex contractu*; and no averment of nonpayment of the amount so unlawfully extorted by menace is required.

ID.—COMPOUNDING OF FELONY—STIFLING OF PROSECUTION AGAINST INNOCENT PERSON—PARI DELICTO.—The complaint stating that the husband was innocent of the crime charged does not show that any felony was compounded, nor that plaintiff and defendant were parties in *pari delicto* to an illegal contract. The stifling of a criminal prosecution against an innocent man, by the payment of money, cannot be wrong in an equal degree to the threatened prosecution itself.

ID.—EXECUTED ILLEGAL CONTRACT—RELIEF OF PARTIES—EQUAL FAULT—FRAUD OR OPPRESSION.—The doctrine that neither of the parties of an executed illegal contract will be relieved in a court of justice applies only where the parties were equally in fault, and each had freely joined in the transaction, without being induced thereto by the fraud or oppression of the other. Where there is oppression on one side and submission on the other, there can be no equal fault.

ID.—RATIFICATION OF NOTES BY PAYMENT NOT SHOWN—RECOVERY OF PAYMENTS.—The complaint averring that the notes were paid under fear of the same threats which induced their execution does not show that the payment thereof amounted to a ratification of the notes; but the payments so made under fear of arrest of the plaintiff's husband can be recovered back.

ID.—DURESS—CERTAINTY—TIME OF PAYMENT OF NOTES.—The complaint being sufficiently certain in showing both that the execution and the payment of the notes were secured by duress, it is not demurrable for uncertainty in not stating when the notes were made payable or when they were paid.

APPEAL from a judgment of the Superior Court of Los Angeles County. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

Horace Bell, for Appellant.

William J. Hunsaker, for Respondent.

GRAY, C.—This is an appeal by plaintiff from a judgment for defendant following an order sustaining a demurrer to the complaint.

The complaint sets forth that on the nineteenth day of August the defendant filed a complaint against and caused the arrest of one Newman on a charge of larceny of defendant's goods, and about the same time accused Woodham, the husband of plaintiff, with complicity in said crime and with knowingly and feloniously receiving said goods from

Newman after they had been stolen, and demanded that Woodham pay him four hundred dollars, claimed by defendant to be the value of said goods. Woodham refused to comply with this demand, and thereafter, on August 23, 1895, defendant threatened plaintiff that if the four hundred dollars were not immediately paid to him he would procure the arrest of her said husband on a charge of felony in having knowingly received the stolen goods. Plaintiff, under fear of said threat, believing that defendant would carry the same into execution, agreed to comply with the demand and pay defendant the four hundred dollars, and thereupon, in the language of the complaint, "on said day, the twenty-third day of August, 1895, under fear of said threat, the plaintiff, instead of the payment of money to the defendant, made, executed, and delivered to the defendant six promissory notes aggregating the sum of two hundred and eighty-six dollars, signed the same herself and procured each of the said notes to be signed by A. R. Maines, a merchant and manufacturer of Los Angeles, a man of property, a wealthy man, and a man of good commercial and bankable credit, and at the time the said notes were so as above made, signed, and delivered, as aforesaid, by this plaintiff and the said A. R. Maines, they were the property of this plaintiff, and were then and there in the aggregate of the cash value of two hundred and eighty-six dollars, and under the continuance of the fear and duress, as aforesaid, and for fear that the defendant would, unless she paid the said notes, carry into effect the threats he had made in respect to her said husband, and with a continuation of said threats, she paid to the defendant the money, to wit, two hundred and eighty-six dollars, the amount as aforesaid expressed in said notes, with the interest accrued thereon. Also, the plaintiff was constrained and obliged to pay said notes, because, the said A. R. Maines having signed the said notes, he maintained that they were his notes; that he had not signed them under any manner of duress, and that he did not know that they had been extorted from the plaintiff by the defendant, and said to plaintiff, 'If you do not pay them I will, as I don't propose to have my name dishonored in the nonpayment of notes.'

"That on the same day, and as a part of the same transaction, and in pursuance of the same threat to accuse plaintiff's said husband of a felony as aforesaid, and as a part of and to make up the said sum of four hundred dollars, in which the defendant demanded that the plaintiff pay him, and in that behalf, the plaintiff delivered to the defendant goods, wares, and merchandise of the value of one hundred and fourteen dollars, which when added to the value of the amount stated in the notes aforesaid aggregated the sum of four hundred dollars. That the plaintiff would not have procured the said notes to have been so as above executed and delivered to the defendant, and would not have delivered to him the goods and merchandise so as above stated, and would not have paid the said notes, except that she was in fear that the defendant would procure her said husband to be arrested on the charge of felony as aforesaid.

"That the plaintiff's said husband was not guilty of the charge threatened to be made against him by the said defendant, her said husband having in the due course of business purchased the said goods from the said Newman, who was then and there the confidential clerk and salesman of the defendant, and having paid therefor the full value of said goods, to wit, the sum of one hundred and thirty dollars cash; and now the plaintiff brings this action for the recovery of the said sum of four hundred dollars from the defendant, with interest thereon, claiming that the same was unlawfully extorted from her as aforesaid."

Judgment was demanded for four hundred dollars, with interest from the 23d of August, 1895, and costs. The demurrer to the complaint was based on the grounds of insufficiency of facts; that it affirmatively appeared from the complaint that the transaction out of which the pretended cause of action arose was unlawful and void, and that the complaint was uncertain in several specified particulars. Respondent in his very able brief sets out in logical and concise form six reasons why the demurrer was properly sustained, together with six particulars wherein the complaint is claimed to be deficient. We will notice these reasons and particulars in the order in which they appear in said brief.

1. It was not necessary to allege in the complaint that the sum sought to be recovered had not been paid, because the complaint was not based on any contract, either express or implied, but on the contrary every sentence of it sounded in tort. Plaintiff might have declared on an implied contract, but she did not; but chose rather to set forth the tortious acts of defendant showing that he had obtained money and goods from her by threats and menace, and then, after reciting the facts, the pleader, apparently to place the action where she wanted it and where there could be no question that it was brought for a tort, concludes as follows: "And now the plaintiff brings this action for the recovery of the said sum of four hundred dollars from the defendant, with interest thereon, claiming that the same was unlawfully extorted from her as aforesaid."

The allegation of nonpayment is required in a complaint on the theory that a failure to pay constitutes the breach of the contract sued on. (*London etc. Fire Ins. Co. v. Liebes*, 105 Cal. 203.) Where there is no contract there can be no breach; and where the complaint, as here, is distinctly based on the tort of the defendant, and nothing is said as to any agreement implied or express, the allegation of a breach would be inappropriate as well as unnecessary.

2. It does appear from the complaint that defendant obtained the money and property from plaintiff by means of a menace (Civ. Code, secs. 1569, 1570), for the complaint alleges that the plaintiff would not have delivered the goods nor paid the notes except that she was in fear that the defendant would procure her said husband to be arrested on the charge of felony as he had threatened to do. (Civ. Code, sec. 1568.)

3. Taking the allegations of the complaint as true, no felony had been committed by plaintiff's husband, and there could be no compounding of a felony where none existed. (*Heckman v. Swartz*, 50 Wis. 267.) Nor could the plaintiff be said to be *in pari delicto* with defendant in her efforts to stifle a prosecution against her innocent husband. The stifling of a prosecution threatened against an innocent man, by the payment of money, cannot be wrong in an equal degree to the threatened prosecution itself. Especially must this be so where menaces and coercion are used to compel the payment of the money. In a case involving the same prin-

ciple Lord Ellenborough said: "This is not a case of *par delictum*; it is oppression on one side and submission on the other; it never can be predicated as *par delictum*, when one holds the rod and the other bows to it." (*Smith v. Cuff*, 6 Maule & S. 160. See, also, Pomeroy's Equity Jurisprudence, sec. 942, and cases there cited.)

4. It is true, as a general rule, that "where an illegal contract has been fully executed on both sides the law will aid neither party to recover anything parted with thereunder," but this rule is subject to the qualification, among others, that the parties to the illegal contract are *in pari delicto*; and it will be seen, upon examination of the cases cited to support this rule, that they all proceed upon the theory that the parties to the contracts were equally in fault and each had freely joined in the transaction without being induced thereto by the oppression or fraud of the other. We think, therefore, that neither the general rule referred to nor the authorities cited in support thereof govern the case made by the complaint herein.

5. The allegations of the complaint do not show that the payment of the notes amounted to a ratification of the contract under which they were originally given, for it is alleged that the payment was made under the same influence and fear which induced the making of the notes.

In *Bentley v. Robson*, 117 Mich. 691, a wife gave a mortgage on her property to save her husband from threatened imprisonment, and in a suit by her to set aside the mortgage it was held that the taint of duress attaching to the execution of a mortgage is not removed by payments on the mortgage, or other recognitions of it, made under the same influence which controlled its original execution. If the payment was made under fear of the arrest of her husband, caused by the threats of defendant, the money can be recovered back. (*Schultz v. Culbertson*, 46 Wis. 313.)

6. It appears from the complaint that plaintiff relies upon duress both at the time of giving the notes and at the time of making the payments, and the facts showing such duress are stated with reasonable certainty. It was not nec-

essary to state when the notes were made payable or when they were paid; for while those dates, as probative facts, might have thrown some light on the question of duress, the ultimate fact to be established was the duress itself, and that being properly set out the complaint was not uncertain nor ambiguous as claimed by respondent.

As was said in *Heckman v. Swartz, supra*: "We think the complaint makes a clear and very strong case of extortion from an innocent person . . . by threats of a criminal prosecution, and if sustained upon the trial entitles the plaintiff to recover." The demurrer should have been overruled.

We advise that the judgment be reversed and the cause remanded, with directions to the court below to overrule the demurrer.

Haynes, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrer.

Henshaw, J., McFarland, J.

Temple, J., concurred in the judgment.

[Sac. No. 492. In Bank.—October 3, 1900.]

JOHN N. WOODS et al., Respondents, v. NICOLAUS JENSEN, Appellant.

ACTION TO QUIET TITLE—CONVEYANCE IN SATISFACTION OF MORTGAGE—

RECITALS—BURDEN OF PROOF AS TO INTENTION.—In an action to quiet title, where the plaintiffs relied upon a conveyance in fee simple made by the defendant to the plaintiffs, which recited that it was made in consideration of the satisfaction and cancellation of a mortgage from defendant to the plaintiffs, and an additional sum of fifty dollars, and that it was not made for the purpose of securing money due, but was executed and delivered for the purpose of conveying the land to the plaintiffs, their heirs and assigns, by a title in fee simple absolute, the burden of proof is not

upon the plaintiff to show that such deed was not intended as a mortgage, but is upon the defendant to show by clear and convincing evidence that the deed was so intended.

ID.—CONFLICTING EVIDENCE AS TO INTENTION—FINDINGS OF JURY—APPEAL.—Where there is conflicting evidence as to whether the deed was or was not intended as a mortgage, the findings of the jury that the plaintiffs were the owners of the land in fee simple, and that the defendant owned no interest therein, are warranted by the evidence, and cannot be disturbed upon appeal.

ID.—CONDITIONAL AGREEMENT TO RECONVEY—PERMISSION TO RETAIN POSSESSION.—The mere giving to the defendant by the plaintiffs of a conditional agreement to reconvey the land on or before a certain date, upon payment of a specified sum of money, and if not paid the agreement should become void and cancel itself, together with a verbal agreement for retention of possession by the defendant until that date, does not show the transaction to be a mortgage, in the absence of sufficient proof that it was so intended.

ID.—EVIDENCE—CONVERSATION WITH DEFENDANT'S ATTORNEY—AGENCY—MAKING OF CONTRACT.—Evidence is admissible to show a conversation between one of the plaintiffs and the attorney for the defendant, to whom the defendant, who spoke but little English, referred the plaintiff, when he was pressed for payment of the mortgage; and such evidence is not subject to the objection that plaintiff's attorney had no authority to bind the defendant by contract, where it appears that such conversation was merely preliminary, and that the transaction was not consummated until a meeting of the plaintiff and of the defendant and his attorney, who then acted as interpreter for the defendant, and that the defendant thereafter executed the deed.

ID.—TEMPORARY PLEDGE OF MORTGAGE—SUBSEQUENT SATISFACTION—TITLE NOT AFFECTED.—The fact that the note and mortgage were temporarily pledged when the deed was executed, and were redeemed and canceled, and satisfaction of the mortgage entered upon the record, several days thereafter, does not affect the title acquired by the deed.

ID.—CANCELLATION WRITTEN UPON NOTE—SECONDARY EVIDENCE.—Secondary evidence of the plaintiff that he wrote the words "canceled and paid" on the back of the note, is sufficiently warranted by proof that he put the note and mortgage in his pocket with those words on the note, to be delivered to the defendant or his attorney, and thought he had given them to the attorney, and could not since find them, though he had looked everywhere among his papers. The fact that he did not expressly state that he had looked in his pocket, the question not having been asked him, cannot affect the sufficiency of the foundation laid.

ID.—IMMATERIALITY OF EVIDENCE—NOTE RENDERED VALUELESS—ABSENCE OF CONDITION.—The proof of the cancellation of the note cannot be material in view of the cancellation of the mortgage upon the records, rendering the note of no value, and in view of the further fact that the cancellation of the note and mortgage was not a condition either precedent or subsequent to the title conveyed by the deed.

ID.—NEW TRIAL—"IRREGULARITY IN PROCEEDINGS OF COURT"—AFFIDAVITS—NATURE OF GROUND.—"Irregularity in the proceedings of the court," as a ground for new trial, must be based upon affidavits; and this ground is intended to refer only to matters which an appellant cannot fully present by exceptions taken during the progress of the trial, and which, therefore, must appear by affidavit.

ID.—IMPROPER QUESTIONS ASKED BY COURT—EXCEPTIONS—STATEMENT.—Objections to questions asked of witnesses by the court, equally with objections to questions asked by counsel, can only be reviewed upon exceptions taken thereto at the trial; and improper questions asked by the court cannot be urged as a ground of "irregularity in the proceedings of the court." If exceptions are not taken, the fact that questions so asked are embodied in the statement is immaterial; and the respondent is not bound to object to their being inserted therein.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial.
Joseph H. Budd, Judge.

The facts are stated in the opinion of the court.

J. G. Swinnerton, and Max Grimm, for Appellant.

W. B. Nutter, for Respondents.

McFARLAND, J.—Judgment went in the court below for plaintiffs, and defendant appeals from the judgment and from an order denying his motion for a new trial.

The action was to quiet title to certain described land. The answer merely denies the ownership of plaintiffs and avers ownership in defendant. It is admitted that on the second day of January, 1897, the defendant was the owner in fee of the land, and that at said date and for two or three years previous thereto the plaintiffs held a mortgage on the land executed by defendant for something over five thousand dollars. On that day the defendant executed to the

plaintiffs a deed which upon its face granted and conveyed the land to the plaintiffs and to their heirs and assigns forever. It recited that it was made in consideration of the satisfaction and cancellation of the mortgage, and also an additional sum of fifty dollars. It also had this additional clause: "This conveyance is not made for the purpose of securing the payment of money due from said first party to said second party, but is executed, acknowledged, and delivered for the purpose of conveying to said second party, their heirs and assigns, the said land by a fee simple title absolute." The real defense to the action is that this deed was merely intended as a mortgage to secure the money which had been secured by the former mortgage mentioned in the deed. The court called in a jury, who returned a general verdict for plaintiff and also answers to certain special issues submitted to them—the answers to the special issues being to the effect that plaintiffs were owners in fee of the land, and that defendant was not the owner of the same or of any interest in it or in any part of it.

Appellant contends that the evidence does not warrant the verdict and findings of the jury, which are, of course, in effect, that the deed in question conveyed the absolute fee and was not intended as a mortgage. But this contention cannot be maintained. Appellant's contention seems to be, to a large extent at least, that although plaintiffs have a deed conveying the absolute title, yet the burden is on them to show that it was not a mortgage. But, of course, the exact opposite of this proposition is true. That a deed purporting on its face to convey the title absolutely may be shown by parol evidence to be something else—namely, a mortgage—is a striking exception to the general rule, and it has been universally held that the character of the instrument cannot be thus changed except upon clear and convincing evidence. (See *Sheehan v. Sullivan*, 126 Cal. 189.) In the case at bar, the utmost that could be said on the subject is that the testimony of the two witnesses, John W. Woods for plaintiff and Max Grimm for defendant, was to some extent conflicting as to whether the deed was intended as a mortgage.

Exceptions were taken to some parts of the instructions given by the court to the jury; but as to those objections it is sufficient to say that the instructions of the court were a clear and correct statement of the law bearing upon the main issue in the case. An exception was made to a question or two asked by plaintiff of the witness Woods as to certain conversations which he had with defendant's witness Grimm, upon the theory that plaintiff was trying to prove a contract made by Grimm for the defendant without authority from the latter. The defendant was a German and spoke but little English, and when the plaintiff pressed him for payment of the mortgage, he referred him to Mr. Grimm, and told him to go and see Mr. Grimm and talk with him, as Mr. Grimm was his attorney. Before these objections were made, counsel for defendant had already asked the witness Woods about, and the latter without objection had testified to, certain propositions which Grimm had made to him when he went to see him as directed by the defendant; and there was really nothing further brought out by the questions of plaintiff to Woods to which the objections were made. As the defendant had directed plaintiff to talk to Grimm about the matter, we see no objection in introducing what Grimm said. Appellant contends that Grimm had no power to make a contract with the plaintiff. But, while that may be so, no contract was made by Grimm; there was merely a preliminary conversation with him in which Grimm, according to the testimony of witness Woods, made a certain proposition to the latter on the part of the defendant. But the transaction was not consummated until Woods, Grimm, and the defendant were all present—Grimm, who understood German, acting as the interpreter between Woods and the defendant. The deed itself was executed by the defendant. Therefore we do not think that these objections were well taken.

Appellant seems to attach some importance to the fact that at the time this deed was executed plaintiffs had temporarily pledged the note and mortgage to a Mrs. Ralph as security for some money owing to the latter by the plaintiffs. A few days after the execution of the deed, the plaintiffs received back from Mrs. Ralph this note and mortgage, and on the 13th of the month entered satisfaction of the

mortgage upon the books of the county recorder. The plaintiff Woods testified that at the same time he wrote on the back of the note "cancelled and paid"; and the appellant objected to his so testifying because there was no sufficient proof that the note had been lost. Woods testified, however, that after he had marked the note and mortgage canceled he put them in his pocket with the intention of giving them to either the appellant or his attorney Grimm, and thought he had given them to the latter, and that he had not been able since to find them. He testified very fully that he had looked everywhere among his papers and could not find the note and mortgage. Appellant contends that this is not sufficient because he had not testified expressly that he had looked "in his pocket." But certainly his testimony was sufficient to show that the note could not be found—especially as it did not occur to anyone at the trial to ask him expressly if he had looked in his pocket. His testimony was sufficient to include all probable places where the papers would be likely to be found. Moreover, it was a matter of no consequence; in the first place, the mortgage was canceled on the records, and neither it nor the note would have been afterward of value; and, secondly, the cancellation of the note and mortgage was not a condition either precedent or subsequent which could at all affect the conveyance of the title by the deed.

One of the grounds of the motion for new trial was "irregularity in the proceedings of the court"; and this cause for a new trial is based entirely upon certain questions asked by the court of appellant's witness which appellant claims should not have been asked. These questions appear in the statement as occurrences which took place at the trial; but no exceptions were taken to them, and there is no affidavit in respect to them. Under sections 657 and 658 of the Code of Civil Procedure, "irregularity in the proceedings of the court" must be "made upon affidavits." It is quite evident that this ground for a new trial is intended to refer to matters which an appellant cannot fully present by exceptions taken during the progress of the trial, and which therefore must appear by affidavit. An inadmissible or improper question asked a witness during the progress of a trial,

whether asked by counsel or court, must be excepted to, or advantage of it cannot afterward be taken. The fact that such occurrences as those here objected to appear in a bill of exceptions or a statement without any exceptions having been taken to them is of no consequence. Appellant contends that respondents should have objected to having these occurrences put into the statement; but respondents are not in a position to object to anything done by a court which rendered a judgment in their favor, and, moreover, why should they object to something which was of no importance? Moreover, we think that appellant gives undue significance to the few questions asked by the court; and, if they could be reviewed here, we could scarcely hold them to be such an abuse of discretion and so prejudicial as to call for a reversal.

At the time of the execution of the deed plaintiffs gave to defendant a certain paper writing which is somewhat discussed in the briefs, but which throws no new light on the transaction, and by no means strengthens appellant's contention. It is merely an agreement that if defendant should pay to plaintiffs a certain sum of money on or before October 1, 1897, plaintiffs would "reconvey said lands" to him, and, if he should not do so then the agreement "shall become void and cancel itself." The provision that defendant might remain in possession until October 1st was part of the original verbal agreement—the plaintiff Woods testifying that he would rather allow defendant to take that year's crop than to go to the expense and trouble of a foreclosure. Of course, no matter how strong the language of the deed, or of any instrument accompanying it, might be, still, under the statute, it could have been proven by sufficient oral testimony to have been intended as a mortgage; but such sufficient testimony was not produced.

There are no other points which call for a discussion.

The judgment and order appealed from are affirmed.

Henshaw, J., Harrison, J., Van Dyke, J., and Garoutte, J., concurred.

Temple, J., dissented.

Rehearing denied.

[L. A. No. 710. Department One.—October 4, 1900.]

ALBERT HADLEY, Respondent, v. I. Q. DAGUE, Appellant.

STREET IMPROVEMENT—TIME FOR COMPLETION OF WORK—EFFECT OF APPEAL—SETTING ASIDE ACCEPTANCE—JURISDICTION TO EXTEND TIME.—An appeal taken to the city council before the expiration of the time allowed to complete a street improvement, and after the work has been accepted as complete, operates to suspend the running of the time originally allowed, and, upon the city council setting aside the acceptance, it has jurisdiction to extend the time for the final completion of the work.

ID.—ASSIGNMENT OF CONTRACT—COMPLETION OF WORK BY ASSIGNEE—ASSESSMENT AND WARRANT.—The contractor may assign the contract before the completion of the work, and where the work is completed by the assignee, the warrant accompanying the assessment may run in favor of the assignee named therein as assignee of the original contractor also named, and such assignee may demand and enforce the assessment.

ID.—REFERENCE TO BONDS IN WARRANT—DESCRIPTION AND NOTICE.—Where the resolution of intention showed that the cost of the improvement would exceed one dollar per front foot, and that serial bonds would be issued to cover the cost under the provisions of the act of 1893, a reference to the bonds in the warrant giving a general description of them as "serial bonds bearing interest at the rate of six per cent per annum and extending over a period of ten years from their date of issue, to represent the cost and expenses of the work described in the assessment, and in the manner and form prescribed by law," and giving the notice provided for in the act of 1893 relative to the issuance of a bond of fifty dollars or more to represent each assessment, etc., shows a sufficient compliance with that act.

ID.—DIRECTIONS BY COUNCIL—COMPLETION OF WORK—SUPERVISION OF COUNCIL—ACTION OF SUPERINTENDENT—NEW ASSESSMENT.—Where the city council upon appeal, after vacating the acceptance of the work by the street superintendent and a former assessment based thereon, directed the contractor to complete the work required by it "under the direction of the city council," and that when so done the superintendent should accept the work, and issue a new warrant, assessment, and diagram, such directions are in strict compliance with section 11 of the street improvement act.

ID.—ACCEPTANCE OF WORK—INDORSEMENT BY SUPERINTENDENT UPON NEW ASSESSMENT.—Where the completed work was accepted by the council, and the formal acceptance of the superintendent appeared upon the face of the new assessment, authenticated by his signature, his indorsement upon the assessment stating that the work was performed under the supervision of the council and accepted by it, and not under his control or supervision, and was not accepted by him, and that he disclaimed all responsibility for the work, and signed and delivered the assessment and warrant upon the order and authority of the council, cannot qualify his formal acceptance of the work, and is not inconsistent with the proper directions of the council.

ID.—RECORD BY SUPERINTENDENT—PRIMA FACIE EVIDENCE—RECORD PRESUMED.—The street improvement act does not require that the evidence of the recording of the warrant, assessment, and diagram and certificate of the engineer in the office of the superintendent of streets shall be offered as a part of the *prima facie* evidence sufficient to entitle the plaintiff to recover; but the *prima facie* character given to those documents, together with the affidavit of demand and nonpayment, includes the proper recording of the instruments required to be recorded, if there is no evidence to show the contrary.

ID.—CERTIFICATE OF ENGINEER NOT SHOWING RECORD.—The fact that the certificate of the engineer offered in evidence does not show that it was recorded cannot vitiate it, in the absence of evidence tending to show that the certificate was not recorded.

ID.—CONSTRUCTION OF RESOLUTIONS OF INTENTION—COST OF WORK—INTERSECTIONS—FINDING BY BOARD—PRESUMPTION.—A resolution of intention in which it is found that the cost of the improvement will be more than one dollar per foot along each line of the street, "including the cost of intersections," must be construed as referring to the cost of intersection work assessable upon said frontage," and where there is nothing in the record to show that the finding of the board that the cost of the improvement would exceed one dollar per front foot was not based upon a proper calculation, it must be presumed that it was so based, the *prima facie* evidence of the plaintiff's case not being overcome.

ID.—FINDING MADE IN RESOLUTION—SEPARATE ORDINANCE NOT REQUIRED.—The finding as to the cost of the improvement was properly embodied in the resolution declaring the intention of the board to order the improvement, and need not be embodied in a previous separate ordinance finding such cost.

ID.—CONSTITUTIONALITY OF STREET IMPROVEMENT ACT—APPORTIONMENT OF EXPENSE ACCORDING TO FRONTAGE—BENEFIT FROM WORK.—The street improvement act, in providing for apportioning the expense of a street improvement according to the frontage of the lots along the street, is constitutional and valid. It is to be deemed a legis-

lative declaration that the property within the district improved will receive a benefit from the improvement in proportion to its frontage upon the work; and in the absence of any facts showing that a particular assessment, so based, is unjust and not according to benefits, the statute in its application thereto cannot be deemed unconstitutional, and it is the duty of the court to uphold the assessment.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Walter Van Dyke, Judge.

The facts are stated in the opinion of the court.

Barclay & Camp, for Appellant.

The complaint states no cause of action because it appears therefrom that the work was not completed within the time fixed by the contract or any legal extension of such time. (*Beveridge v. Livingstone*, 54 Cal. 54; *Raisch v. San Francisco*, 80 Cal. 1.) The issuance of the restraining order did not interrupt the running of the time. (*Klauber v. San Diego Ry. Co.*, 95 Cal. 353; *Remy v. Olds*, 88 Cal. 537; *Reid v. Edwards*, 7 Port. 508; *People v. Bartlett*, 3 Hill, 570.¹) The complaint states no cause of action, because the warrant runs to the Western Contracting and Construction Company and not to John T. Long, the contractor. (*Palmer v. Burnham*, 120 Cal. 364; *Taylor v. Palmer*, 31 Cal. 240.) A lien is assignable, but a right to have a lien is not. (*Mills v. La Verne Land Co.*, 97 Cal. 254²; *McCrea v. Johnson*, 104 Cal. 224; *Rauer v. Fay*, 110 Cal. 361, 367.) The assessment on its face disproves the allegation that the work was done under the direction of or to the satisfaction of the street superintendent. (Vrooman Act, secs. 6, 8, 11; *Williams v. Bergin*, 108 Cal. 166, 169; *Witter v. Bachman*, 117 Cal. 318; *Gray v. Lucas*, 115 Cal. 430.) The evidence is not sufficient to make out a case, because the engineer's certificate bears no indorsement of recordation. (*Witter v. Bachman*, *supra*.) The evidence is not sufficient to make out a case, because it appears that the council made no sufficient finding relative to the cost of the work. (Bond Act, Laws 1893, p. 33;

¹ 31 Am. Dec. 720.

² 33 Am. St. Rep. 168.

Warren v. Chandos, 115 Cal. 382; *Dehail v. Morford*, 95 Cal. 460; *In re Grove Street*, 61 Cal. 438, 448-50; *Lake Co. v. Sulphur etc. Co.*, 66 Cal. 17; *Emeric v. Alvarado*, 90 Cal. 444, 465, 466; *Brock v. Luning*, 89 Cal. 316; *People v. Sierra etc. Co.*, 39 Cal. 511, 515, 516; *People v. Hollister*, 47 Cal. 408; *Shepard v. Colton*, 44 Cal. 628; *Donnelly v. Tillman*, 47 Cal. 40; *Donnelly v. Marks*, 47 Cal. 187; *Reis v. Graff*, 51 Cal. 86; *Haskell v. Bartlett*, 34 Cal. 281.) The Vrooman act is in conflict with the fourteenth amendment to the constitution of the United States, in not requiring an assessment in proportion to benefits. (*Norwood v. Baker*, 172 U. S. 269.)

Dunn & Cruther, and White & Monroe, *Amici Curiae*, for Appellant.

The assessment is unconstitutional and void in not making the assessment in proportion to benefits, and in taking property without due process of law or equality of burden. (*Norwood v. Baker*, 172 U. S. 269; *State v. Mayor etc. of Newark*, 37 N. J. L. 416, 420-23³; *Cooley's Constitutional Limitations*, 495; *Exchange Bank v. Hines*, 3 Ohio St. 1, 15; *Dillon on Municipal Corporations*, sec. 761; *Allen v. Drew*, 44 Vt. 174; *Tidewater Co. v. Coster*, 18 N. J. Eq. 519⁴; *Yeatman v. Crandall*, 11 La. Ann. 220; *Taylor v. Palmer*, 31 Cal. 241; *Holley v. County of Orange*, 106 Cal. 420; *Fay v. Springfield*, 94 Fed. Rep. 409; *Violett v. Alexandria*, 92 Va. 561⁵; 31 L. R. Ann. 382; *Davidson v. New Orleans*, 96 U. S. 104; *Zeigler v. South etc. Ry. Co.*, 58 Ala. 594; *Stuart v. Palmer*, 74 N. Y. 191⁶; *County of Santa Clara v. Southern Pac. R. R. Co.*, 18 Fed. Rep. 411; *Scott v. Toledo*, 36 Fed. Rep. 385.)

Jones & Weller, and Finlayson & Finlayson, for Respondent.

The time for completion of the work was suspended by the appeal and the extension of time by the council was valid. The time during which the injunctive order was in force cannot be counted as part of the time allowed. (*Wakefield v. Brown*, 38 Minn. 361.⁷) The assignment by the con-

³ 18 Am. Rep. 729.

⁴ 90 Am. Dec. 634.

⁵ 53 Am. St. Rep. 825.

⁶ 30 Am. Rep. 289.

⁷ 8 Am. St. Rep. 671.

tractor was valid. (Civ. Code, secs. 1044, 1083, 1084, 1458; *Taylor v. Palmer*, 31 Cal. 241; *Hendrick v. Crowley*, 31 Cal. 472; *Himmelman v. Reay*, 38 Cal. 163.) The law requires the work directed on appeal to be done to the satisfaction of the council. (Vrooman Act. secs. 8, 11; Stats. 1899, p. 168.) It does not make the recorded certificate of the engineer, or any certificate or recordation, a part of plaintiff's *prima facie* evidence, but the recordation must be presumed from the *prima facie* case. (Vrooman Act, sec. 12.) The plaintiff having made a *prima facie* case, and there being no evidence to the contrary, the judgment should be affirmed.

HARRISON, J.—Action upon a street assessment. The common council of the city of Los Angeles passed an ordinance for the improvement of Main street in that city, between Ninth and Thirty-seventh streets. Plans and specifications, together with an estimate of the cost of the work, were furnished by the city engineer prior to the passage of the resolution of intention, and in that resolution the city council declared that it found upon such estimate that the cost of the improvement would be greater than one dollar per front foot along each line of the street, including the cost of intersections, and that in accordance with the provisions of the act of February 27, 1893, serial bonds extending over a period of ten years would be issued to represent its cost. After the completion of the work and issuance of the assessment therefor, demand and return of nonpayment were made thereon. Thereafter the appellant, whose property had been assessed for its proportion of the cost of the work, notified the city treasurer, in accordance with the provisions of the aforesaid act, that he desired no bond to be issued for the assessment against his land, and accordingly no bond therefor was issued. The assessment not being paid, the present action was brought for its enforcement by a sale of the land. Judgment was rendered in favor of the plaintiff and a new trial denied, from which he has appealed.

The contract for doing the work was entered into May 6, 1896, and provided that the work should be completed within two hundred and fifty days from its date—i. e., on or before January 11, 1897. Before the expiration of this time the

contractor did all the work named in the contract and specifications to the satisfaction of the street superintendent, and on December 4, 1896, the superintendent accepted and approved the work, and made and issued an assessment to cover the sum due therefor. Thereafter, and prior to January 1, 1897, certain owners who were assessed for a portion of the expense of the work appealed therefrom to the city council, stating as the grounds of their appeal that the work had not been performed in a good and substantial manner. March 23, 1897, the city council passed a resolution, wherein it found that the work was defective in certain respects, and not in accordance with the requirements of the contract, and vacated and set aside the warrant and assessment, and also the action of the superintendent in accepting the work, and directed the contractor to remedy said defects "under the direction of said city council." At the same time the council extended the time for the completion of the work under said contract until the first day of July, 1897. The contractor thereupon, under the authority of this resolution, did whatever work was required to comply with its requirements, and completed the same on the 15th of May, to the satisfaction of the city council and the superintendent of streets. June 7th the council passed a resolution accepting the work and directing the superintendent to make a new warrant, assessment, and diagram therefor, and on June 26th that officer made the assessment upon which the present action is brought.

1. Upon these facts the appellant contends that as the work was not completed within the period of two hundred and fifty days from the date of the contract, and as the subsequent extension was not made until after the expiration of that period, the contract had expired before the acceptance of the work, and the assessment therefor was invalid and created no lien. We are of the opinion, however, that this objection cannot be sustained. The contract provided, in accordance with the express requirements of the statute, that the contractor would do and perform the work "under the direction and to the satisfaction of the street superintendent." The provision therein fixing two hundred and fifty days as the time for the completion of the work must refer

to the completion of the work according to the terms of the contract—that is, to the satisfaction of the street superintendent and under his direction; and, in the absence of any charge of fraud or collusion, it must be held that upon such completion of the work within the time limited the contractor had sufficiently fulfilled the condition of his contract to prevent a forfeiture thereof by reason of the subsequent disapproval by the city council of such acceptance. The utmost that could be claimed in support of the appellant's contention would be that, if the superintendent's acceptance was set aside, the time thereafter required for the final completion of the work should be counted as a portion of the time originally fixed for its completion. While the appeal from the act of the superintendent in accepting the work was pending before the council and undetermined, the running of the time originally fixed for the completion of the work was suspended and the work was completed within the time granted by the council at the time it set aside the superintendent's acceptance.

2. The contract was originally awarded to John T. Long, and before its completion was assigned to the Western Contracting and Construction Company. The warrant issued with the assessment was in favor of "The Western Contracting and Construction Company, assignee of John T. Long, agents or assigns." The appellant contends that the warrant should have been issued in the name of the original contractor, and that its issuance in favor of his assignee was unauthorized. The form of warrant which is prescribed in the street improvement act in terms authorizes and empowers the contractor, his agents or assigns, to demand and receive the several assessments, and the act declares that the warrant to be issued shall be "substantially" in this form. The right of the contractor to assign the contract, prior to the completion of the work, is recognized in many portions of the act, and has been recognized by this court. (*Anderson v. De Urioste*, 96 Cal. 404.) After he has ceased to have any interest in the contract, or in the assessment therefor, there would seem to be no reason for the issuance of the warrant in his name, especially since the statute does not specifically require it. Sections 9 and 10 of the act designate

the assignee as the proper person to whom the warrant and assessment are to be delivered. We hold, therefore, that a warrant in favor of one who is therein named as the assignee of the original contractor, whose name is also given, is "substantially" in the form prescribed in the act. Proof was made at the trial herein that such assignment had been made by the original contractor.

3. It is further objected that the reference in the warrant to the issuance of bonds, as provided by section 3 of the aforesaid act of February 27th is insufficient. The reference to the bonds in the warrant is as follows: "Serial bonds bearing interest at the rate of six per cent per annum and extending over a period of ten years from their date of issue, to represent the costs and expenses of the work described in the assessment, and in the manner and form prescribed by law, and notice is hereby given that a bond in such series will issue to represent each assessment of fifty dollars or more, remaining unpaid for thirty days after date of this warrant, or five days after the decision of the city council upon an appeal."

We deem this to be a sufficient compliance with the act of 1893. That act requires that there shall be "included in the warrant" "a notice that a bond will issue to represent each assessment of fifty dollars or more, remaining unpaid for thirty days after the date of the warrant, or five days after the decision of said council, upon an appeal, and describing the bonds." The warrant in question contains both a description of the bonds and the notice thus specified.

4. Upon the assessment offered in evidence was the following indorsement:

"The foregoing work was performed under the supervision of and was accepted by the Los Angeles city council; said work was not under my control or supervision at any time, and was not accepted by me. I hereby disclaim all responsibility for said work, and I sign and deliver this assessment and warrant upon the order of and the authority of said city council.

"J. H. DRAIN,
"Street Supt."

The appellant contends that by reason of this indorsement it appears that the work was not done under the direction and to the satisfaction of the superintendent of streets, and therefore the *prima facie* character which the statute gives to the evidence offered by the plaintiff was destroyed. Upon the face of the assessment the superintendent had declared: "All of said work has been performed and materials furnished complying with the specifications and under my direction and to my satisfaction and acceptance"—and had authenticated the same by his official signature. It does not appear at what time the above indorsement was made upon the assessment, but it must be held that it was not competent for that officer, after having made and authenticated the assessment in his official capacity, to qualify it by indorsing thereon a direct contradiction of the facts therein stated. Moreover, when the city council vacated the former assessment it directed the contractor to perform the work required by it "under the direction of the said city council," and that when so done the superintendent should accept the work and issue a new warrant, assessment, and diagram. These directions were in strict accordance with the provisions of section 11 of the street improvement act, and the above indorsement of the superintendent is not inconsistent therewith.

5. The certificate of the engineer, offered in evidence, did not show that it had ever been recorded, but was indorsed: "Recorded ———, 189—, ———, Superintendent of Streets." The act requires that the superintendent shall record the warrant, assessment, and diagram, together with the certificate of the engineer, in his office, and that after they are recorded they shall be delivered to the contractor, and it also declares that these documents, with the affidavit of demand and nonpayment, shall be *prima facie* evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action. It does not require that the evidence of the recording shall constitute a portion of the *prima facie* evidence which is sufficient to entitle the plaintiff to recover. No evidence was offered tending to

show that the certificate had not been recorded, and the *prima facie* character which the statute gives to the above evidence offered by the plaintiff includes its proper recording. (See *California Imp. Co. v. Reynolds*, 123 Cal. 88.)

6. For the same reason, the objection to the finding by the city council in reference to the cost of the improvement must be disregarded. The objection to the sufficiency of this finding is that the language of the resolution wherein it is made is that such cost will be greater than one dollar per front foot along each line of said street, "including the cost of intersections," whereas the statute prescribes, as a condition upon which bonds for the improvement may be issued, that the council shall find that the cost will be greater than one dollar per front foot along the line of the street, "including the cost of intersection work assessable upon said frontage." The line of the proposed work herein included twenty-four intersections of cross-streets, and the city engineer had presented an estimate that the probable cost of the work per front foot on each side of the street would be four dollars and ninety cents. The act requires that only one-half of the cost of an intersection shall be assessed upon the frontage of the street along which the improvement is made, and it is therefore urged that it was not shown that the cost of the work "assessable upon the frontage" would be more than one dollar per front foot. The council must be deemed to have used the phrase "cost of intersection" with reference to the matter upon which it was acting, and, as so used, the expression must be regarded as equivalent to the "cost of the intersection work assessable upon said frontage." The record does not show what was the width of any of the intervening streets, or the length of the several blocks of Main street, and we cannot say from any calculation whether the finding of the council was incorrect, but, as it must be assumed that these dimensions had been officially declared and were known to the council, it must be held that the *prima facie* character of the plaintiff's evidence was not overcome. The council was not required to find the exact cost per front foot, but only to determine whether it would be greater than one dollar per front foot.

It was not necessary that the council, before passing an ordinance for the improvement of the street, should by a separate ordinance find the cost of the improvement. Such finding could be made and included in the ordinance declaring its intention to order the improvement.

7. It is next contended by the appellant that the assessment is invalid by reason of the unconstitutionality of the statute under which it was made, in that the statute makes an arbitrary apportionment of the expense according to the frontage of the lots, and does not require that the assessment upon each lot shall be made in proportion to the benefits received by that lot. The constitutionality of the statute has been upheld by this court so frequently that it is not an open question, but the appellants insist that the decision in *Norwood v. Baker*, 172 U. S. 269, wherein it was held that the assessment therein considered was in contravention of the constitution of the United States, is at variance with these decisions and requires them to be disregarded. If the facts and statute under which the present assessment was made were of the same character as those involved in that case, we would without hesitation accept that decision as conclusive upon us, but we are of the opinion that there is a marked distinction between the two cases, and that that decision is not applicable to the facts herein. In *Norwood v. Baker*, *supra*, the question considered by the court was the validity of an assessment for the cost of opening a new street, consisting of the value of the land taken and the costs of its condemnation, and whether the same could be taxed upon the owners of the land abutting upon that taken, irrespective of any consideration of the benefits received by that land. The assessment therein involved did not include any of the expense of improving an existing street, and whether such expense may be assessed upon lands fronting upon the street within certain limits designated by the legislature was not presented or discussed in the opinion; and, although the "improvement" of the street is frequently mentioned in the opinion, this expression is to be read in the light of the question to be determined by the court upon the facts before it.

The village of Norwood desired to open and extend Iven-

hoe street for the distance of three hundred feet from its termination, through the lands of Mrs. Baker, and for that purpose instituted proceedings for the condemnation of a portion of her land fifty feet in width. The constitution of Ohio required that the compensation to be paid to the owners of land thus taken should be made in money, and should be assessed without deduction for benefits to any other property of the owner, and the statute required that the cost and expense should be assessed only on the land bounding and abutting thereon. The ordinance for the condemnation provided, as authorized by the statute of Ohio, that the entire cost of the proceedings, including the money paid for the land, should be assessed per front foot upon the property bounding thereon. In the proceedings for the condemnation of the land its value was assessed at two thousand dollars, and this amount of money was paid to Mrs. Baker out of the public treasury. Thereafter, an assessment—the assessment in question—for the amount so paid to her, together with the costs incurred in the condemnation, was made under the above statute against the two portions of her lot remaining upon either side of the land which had been condemned for the street. It is thus seen that the assessment was not made for the cost of any improvement of any existing street, wherein it may be presumed that the adjacent lots are benefited, but was made solely for the purpose of reimbursing the public treasury for the expense of opening a new street. Its effect was to compel Mrs. Baker, under the guise of an assessment, to pay back into the treasury not only the money that she had received as compensation for the land taken from her, but also the expense that had been incurred in its condemnation. This was in effect the imposition of a tax upon her land for the purpose of reimbursing the treasury for the money which it had paid out for the use of the whole public. The proceeding was a direct sequence in the exercise by the village of its right of eminent domain, since the exercise of this sovereign power includes the payment to the owner for the land, as well as the determination that the taking is necessary for a public use. The mode in which the village could reimburse itself for such payment was by

means of taxation, and, if the exercise of this power was not be borne equally by the whole public, it could be imposed only upon those who should be determined to have been actually benefited by the improvement. It needs but little argument to show that by these proceedings Mrs. Baker's property was taken for a public use without any compensation therefor; and inasmuch as under the constitution of Ohio she was entitled to receive compensation in money for the whole value of the property taken, irrespective of any benefits to her remaining property, the court very readily held that she was compelled, under the guise of an assessment, to part with her property without due process of law.

The principle invoked, that the assessment must be in proportion to benefits, was not disputed in the case, the only question being as to the application of that principle to the facts before the court, and its conclusion was reached by reason of the inhibition of the statute and constitution of Ohio, from considering whether the land assessed had received any benefit by reason of the opening of the street. In no portion of the opinion is it intimated that an assessment for the improvement of an existing street upon the lands abutting thereon, according to their frontage, within a district designated or prescribed by legislative authority, is invalid, nor did the court question the correctness of any of its previous decisions, many of which are cited in the opinion, in which assessments under such a rule had been sustained. In *Mattingly v. District of Columbia*, 97 U. S. 692, that court had said: "Special assessments for special road or street improvements very often are oppressive, but that the legislative power may authorize them to be made in proportion to the frontage, area, or market value of the adjoining property, at its discretion, is under the decisions no longer an open question." In *Bauman v. Ross*, 167 U. S. 548, it had said: "The class of lands to be assessed for the purpose [of a public improvement] may be either determined by the legislature itself by defining a territorial district or by other designation; or it may be left by the legislature to the determination of commissioners, and may be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. The rule of apportionment among the parcels of land

benefited also rests with the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the land or in proportion to the benefits as estimated by commissioners." (Citing in support thereof "the very able opinion" of Judge Ruggles in *People v. Brooklyn*, 4 N. Y. 419,^s and many other cases.) In *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 176, the court held that an *ad valorem* assessment for local improvements was not, of itself, a violation of the principle upon which it should be made, saying: "It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do," and cites in support of this principle *Cleveland v. Tripp*, 13 R. I. 50, saying that it is a case "which treats this subject with great ability," and in which the supreme court of Rhode Island upheld an assessment for a sewer upon the abutting property, which was "mathematically determined by area and frontage" as constitutional and valid. The mode in which the expense of the local improvement shall be borne, as well as the district which is to bear such expense, and the manner in which the expense is to be distributed, is a legislative question. The principle upon which the expense is charged on the property in that district is that that property has received a particular benefit. But, as was said by Mr. Justice Temple in *Lent v. Tillson*, 72 Cal. 428: "The benefit is not the source of the power." Nor does the validity of the assessment depend upon the ability to show that the property assessed was specifically benefited by the amount of the assessment or received that particular amount of benefit. Courts will uphold an assessment made upon such legislative authority, even though the benefits are not shown to be identical with the burden. In *Litchfield v. Vernon*, 41 N. Y. 123, the legislature had authorized the improvement of a street and designated the district upon which an assessment for the expense thereof should be made. The court said: "This local assessment, it is apparent, was based upon the ground that the territory subjected thereto would be

benefited by the work and change in question. Whether so benefited or not, and whether the assessment of the expense should, for this or any other reason, be made upon the district, the legislature was the exclusive judge." In *Walston v. Nevin*, 128 U. S. 582, the court said: "The determination of the taxing district and the manner of the apportionment are all within the legislative power." In *Norwood v. Baker*, *supra*, the court said: "According to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement and which may be subjected to special assessment to meet the costs of such improvements."

The provision in the street improvement act of this state, that in cases where, in the opinion of the city council, the work of the improvement is not "of more than local or ordinary public benefit" the cost of any street improvement shall be assessed as an entirety upon the lots and lands fronting upon the improvements, and shall be apportioned between the several lots therein according to their frontage, is a declaration by the legislature that, in the judgment of that body, the property within that district will receive a benefit from the improvement in proportion to its frontage upon the work. Unless, therefore, it is made to appear upon the face of the proceedings, or by some competent showing, that there is a gross or substantial variation from this principle, it is the duty of the courts, under the rules and authorities above cited, to uphold the assessment. Before the judiciary would be justified in holding an assessment to be invalid, it should be made to appear that it is, as was said in *Norwood v. Baker*, *supra*, "in substantial excess of the benefits," or, as was said in *Cleveland v. Tripp*, *supra*, that it "palpably transgresses" the principle upon which it is authorized. In *Fallbrook Irr. Dist. v. Bradley*, *supra*, the court said: "The way of arriving at the amount may be, in some instances, inequitable and unequal, but that is far from arising to the level of a constitutional problem, and far from the case of taking property without due process of law." In *Lent v. Tillson*, *supra*, the court said: "The benefits need not be immediate. I see no just limitation in this respect, except that a tax will not

be upheld when the courts can plainly see that the legislature has not really exercised its judgment at all, or that manifestly and certainly no such benefit can or could reasonably have been expected to result. The judge should not place his mere opinion against that of the legislature." In *Sears v. Boston*, 173 Mass. 71, the case of *Norwood v. Baker*, *supra*, was invoked against the legality of an assessment which had been made in proportion to the frontage of the property bordering upon the improvement, but the court held that the statute authorizing such assessment was not unconstitutional in its application to the facts of that case saying: "No facts appear in the present case to show that this rule is not proper in its application to the petitioners' property as a method of determining benefits with such approximation to accuracy as can reasonably be required." (See, also, *Ramish v. Hartwell*, 126 Cal. 443.) There is nothing in the record herein tending to show that the appellant is entitled to invoke the principle upon which he relies to defeat the assessment. He made no objection to this nature in the court below in his answer to the complaint, nor did he offer any evidence in support of such objection, but has presented it here for the first time, in his brief in reply to the respondent. In the absence, therefore, of any facts showing that the assessment is unjust, it must be held that the statute cannot be deemed unconstitutional.

The judgment and order are affirmed.

Garoutte, J., and Temple, J., concurred.

Hearing in Bank denied.

[S. F. No. 1547. Department One.—October 4, 1900.]

P. R. SCHMIDT, Appellant, v. CHRISTIAN KLOTZ, Respondent.

QUIETING TITLE—RIGHT OF WAY ALONG OLD ROAD—DESCRIPTION IN DEED—ACTS OF PARTIES—LOCATION OF ROAD.—In an action to quiet title to a right of way eighteen feet in width, along an old road, conveyed by deed from the defendant to the plaintiff, the court may consider the acts of the parties in adopting the description contained in the deed, the building of fences by the defendant so as to give a road eighteen feet in width, and the use and repair by the plaintiff of the road so fenced, for a period of ten years, as indicating the correct location of the road.

ID.—RECOVERY OF COSTS—RIGHT OF WAY APPURTENANT TO LAND NOT ADMITTED.—Where the plaintiff sought to quiet title to a right of way conveyed by deed of the defendant as "appurtenant to plaintiff's land," and defendant claimed an estate in the right of way and merely admitted the right of plaintiff to travel over so much of said land as lies between the fences erected by the defendant, such answer is not to be construed as an admission or disclaimer of the appurtenant right of way claimed by plaintiff, and upon recovery of judgment by the plaintiff upon a finding of his ownership of such right of way, he is entitled to recover costs, as a matter of course, and a direction that each party pay his own costs is erroneous.

ID.—JUDGMENT INCLUDING MATTER NOT IN ISSUE—REMOVAL OF LIMBS OF FRUIT TREES—MODIFICATION UPON APPEAL.—A judgment including matter not in issue, providing that limbs of fruit trees growing on plaintiff's land, not included in the right of way, may be removed by the defendant so far as they may interfere with passage over the road, in regard to which interference no evidence was introduced, is erroneous, and should be modified upon appeal by striking out such matter therefrom.

APPEAL from a judgment of the Superior Court of Napa County. E. D. Ham, Judge.

The right of way over the defendant's lands, set forth in the deed from the defendant to the plaintiff, was described as follows: "Commencing at a point where the old road, as now used, crosses the boundary line between our said lands, and running thence easterly on the line of said old road to the east line of my land, said roadway or right of way to be eighteen feet wide, with such additional width as may be

necessary at the curves or turns thereof." Further facts are stated in the opinion.

F. E. Johnston, for Appellant.

T. B. Hutchinson, for Respondent.

COOPER, C.—Action to quiet title to a right of way. Plaintiff recovered judgment and appeals therefrom, claiming that the judgment is erroneous in several respects, and that he is entitled to more relief than is therein given.

The court had the right to consider the acts of the parties in adopting the description contained in the deed of the right of way from defendant to plaintiff, and the building of fences by defendant and use of the road by plaintiff. (Tyler on Boundaries, 124; *Mulford v. La Franc*, 26 Cal. 108; *French v. Carhart*, 1 N. Y. 102; *Stone v. Clark*, 1 Met. 380.¹) It is evident that the main intention of the defendant in giving the deed, and of the plaintiff in getting it, was to give to plaintiff a right of way eighteen feet wide along an old road. The right of way was opened by the building of fences by defendant. It was eighteen feet wide at all places. The plaintiff enjoyed it and kept it in repair. It is not reasonable to suppose that for the space of ten years the description thus adopted without question was not intended to be the correct one.

The portion of the findings and judgment directing that each party pay his own costs is erroneous. The code directs that costs are allowed of course to the plaintiff upon a judgment in his favor in an action which involves the title or possession of real estate. (Code Civ. Proc., sec. 1022, subd. 5.) This was an action involving the right of way and the possession thereof. In all cases provided in section 1022 of the Code of Civil Procedure the words "of course" mean as a matter of right, and in such cases the question of costs is not left to the discretion of the court, but they follow the judgment. (*Stoddard v. Treadwell*, 29 Cal. 282.)

The defendant claims that plaintiff is not entitled to costs, for the reason that he disclaimed in his answer any interest

¹ 35 Am. Rep. 370.

in the right of way to which plaintiff's title was quieted by the decree. We do not so construe the answer. Defendant expressly admits in the answer that he claims an estate and interest in the property, and alleges "that the same is valid and absolute thereto." In the affirmative part of the answer the defendant admits the "right of plaintiff to travel so much of said land as lies between said fences." This was not an admission of "the right of way appurtenant to plaintiff's land" which the plaintiff claimed, and which the court found he was the owner of.

The findings and judgment provide that the right of way does not include a line of fruit trees on the north side of said right of way, and that wherever the limbs of said trees interfere with the substantial passage over said road the defendant may remove them, or so much of them as will free said right of way. This was in regard to matter not properly before the court, and it has no place in the judgment and findings. There was no issue made by the pleadings as to any fruit trees. It was not necessary for the court, after describing the right of way by metes and bounds to say what was included in the right of way. Neither was it necessary to authorize the defendant or the plaintiff to remove the limbs of trees overhanging the road. The action was brought to have plaintiff's title to the right of way quieted, and this was sufficient and all that was necessary for the court to do. Besides, there is no evidence that any limbs of any trees interfere with the right of way.

We advise that the judgment be modified by striking therefrom the following clauses: "And that each party shall pay his own costs herein, and plaintiff is denied costs against defendant," and "The above right of way does not include the line of fruit trees, or any of said trees, on the north side of said right of way, standing from the county road up to opposite the house of defendant; but wherever the limbs of said trees interfere with the substantial right of passage over said road the defendant may remove them, or so much of them as will free said right of way"; and as so modified the judgment be affirmed, the plaintiff to recover his costs on this appeal.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is modified by striking therefrom the following clauses: "And that each party shall pay his own costs herein, and plaintiff is denied costs against defendant," and "The above right of way does not include the line of fruit trees, or any of said trees, on the north side of said right of way, standing from the county road up to opposite the house of defendant; but wherever the limbs of said trees interfere with the substantial right of passage over said road the defendant may remove them, or so much of them as will free said right of way"; and as so modified the judgment is affirmed, the plaintiff to recover his costs on this appeal.

Van Dyke, J., Garoutte, J., Harrison, J.

[S. F. No. 1497. Department One.—October 4, 1900.]

**ALAMEDA MACADAMIZING COMPANY, Appellant, v.
E. J. PRINGLE et al., Respondents.**

STREET IMPROVEMENT—BOND GUARANTEEING WORK FOR ONE YEAR—VOID CONTRACT AND ASSESSMENT.—An ordinance requiring that the contractor for a street improvement shall give a bond in a sum to be determined by the mayor guaranteeing the work for one year from injury by ordinary use, is unauthorized, improperly increases the burdens of the property owner for the additional expense of necessary repairs for twelve months, and makes the contract and assessment void.

ID.—DUTY OF OFFICERS—SUBSTITUTION OF BOND.—A bond cannot be substituted for the performance of the duty of the officers required to see that the work under the contract is properly done.

APPEAL from a judgment of the Superior Court of Alameda County and from an order denying a new trial. John Ellsworth, Judge.

The facts are stated in the opinion.

Johnson & Shaw, and James C. Martin, for Appellant.

Duncan Hayne, and William B. Pringle, for Respondents.

COOPER C.—This action was brought to foreclose a street assessment lien under an assessment issued by the superintendent of streets of the city of Oakland. Defendants recovered judgment, and this appeal is by plaintiff from the judgment and order denying a new trial. It appears that the contract was let under the street law, and an ordinance duly adopted by the city, which provided, among other things, that all persons bidding for street work shall “file a bond in the sum to be determined by the mayor guaranteeing the work for one year from injury by ordinary use.” Was this specification authorized by the statute, and did it increase the burdens of the property owner? We think it was unauthorized by the statute and that it increased the burdens of the property owner and made the contract and assessment void. (*Brown v. Jenks*, 98 Cal. 12; *Burnett v. Llewelyn*, 32 Pac. Rep. 702.) In the first case cited the provision required the contractor to give a bond “for keeping the streets so improved in thorough repair for the term of five years from the completion of the contract,” and it was held that the provision was not authorized and rendered the contract and lien void. In the opinion it is said: “The bond is not only unauthorized by the words of the statute, but by the requirement changes, and may increase the burdens of the property owner. It is manifest that the obligation to keep the street in repair for five years is a burden which one would not undertake for nothing. Therefore, a contractor would charge a higher price for the work when he was forced to contract also for repairs. The expense undertaken is indefinite, and the property owner must pay for them in advance, whereas the statute provides for repairs after the necessity for them appears. Then, it being contingent, he will be paying for repairs which may never be required.”

It is said that the provision here only guarantees the work, and does not require the contractor to keep the streets in repair, as was the case in *Brown v. Jenks*, *supra*. But we are unable to draw any such nice shades of distinction. The contractor under the bond was bound “to guarantee the work for one year from injury by ordinary use.” It is a self-evident proposition that the use of a paved or macadamized street by

the traveling public for one year will injure it to some extent, at least. The material of which the pavement is made may wear in places, break, or become injured in others; and under this bond the contractor was required to either make the necessary and proper repairs himself, or the city could make them and recover of him and his bondsmen the cost of such repairs. The amount of such injury by ordinary use is a matter of conjecture. It might be one thousand dollars or much more, but whether more or less the principle is the same. It could make no difference, in case the injury were one thousand dollars, whether the contractor should spend the one thousand dollars in making good the injury by repairing the street himself, or pay it to the city and let the city spend it for the same purpose. Neither does the time make any difference. If a contract to keep in repair for five years is a burden upon the taxpayers, so is a contract to keep in repair for one year. Such contract is a burden in either case, although differing in degree. No contractor would undertake for nothing, after having fully complied with his contract, to guarantee the work "from injury by ordinary use" for one year. And no matter how carefully and conscientiously the contractor may have complied with his contract in every detail, so as to be entitled to all agreed to be paid him, he must, in addition to having so performed his contract, pay the wear and tear of the street by ordinary use for one year.

It is argued that the bond was required as a guaranty that the work would be well done and that the bidder was responsible. The amount of the bond is not fixed by the ordinance, but is left to the arbitrary discretion of the mayor. He might require a very small bond of one bidder or class of bidders, and a very large one of some other bidder or class of bidders. But it is not necessary to decide as to whether or not the city council could delegate such authority to the mayor. The contention is fully answered in *Brown v. Jenks, Supra*, where it is said: "Officers are provided and vested with the power and charged with the duty of seeing that such work is properly done. A bond cannot be substituted for the performance of this duty."

We are unable to distinguish this case from the rule laid down in *Brown v. Jenks, supra*.

It is claimed that a different rule has been adopted in other states. An examination of the cases cited has been made, and we fail to find any different rule in any state except where the statute is different from ours. The question has lately been discussed and the authorities reviewed by the supreme court of Oregon in *Portland v. Bituminous Pavement etc. Co.*, 33 Or. 307,¹ and the rule here adopted approved and followed. The court in conclusion said: "It is clear that under the authorities, based upon what we believe to be sound reasoning, the assessment against property to meet the additional expense of such repairs was unwarranted by the charter." In this case we think it perfectly clear that the assessment against the property of defendants included the additional expense of the repairs of the street for one year, by reason of all damages from injury by ordinary use. This must have been the view taken by all the parties when the bond in this case was prepared and approved by the mayor, for the condition there is "that the said company shall keep in good repair for the term of twelve months from the completion and acceptance of the work."

If the views herein expressed are correct, it is not necessary to discuss any other question in the case.

We advise that the judgment and order be affirmed.

Gray, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

¹ 72 Am. St. Rep. 713.

[Sac. No. 690. Department Two.—October 4, 1900.]

**WILLIAM HAYS, Appellant, v. EWELL WINDSOR and
ALICE WINDSOR, Respondents.**

REPLEVIN—TENANTS' SHARE OF CROP—BILL OF SALE BY SURVIVING PARTNER—CONSIDERATION—PROTECTION AGAINST CREDITORS.—The lessor of a farming lease to copartners for one-half of the crop, who, prior to the lease, became surety upon a note of one of the partners who died, and to whose share of the crop his widow, a daughter of the lessor, was entitled, cannot maintain an action to recover possession of the tenants' share of the crop under a bill of sale obtained by him from the surviving partner, without a transfer of possession, and without other consideration than said suretyship, by means of a misrepresentation made by him that the creditors of the firm were about to attach the property, and for the avowed purpose of protecting it against such attachment.

ID.—PARTY TO FRAUD NOT ENTITLED TO RELIEF.—Whether the lessor and the surviving partner were parties to a fraudulent intent *in pari delicto* or not, or whether the fraud and deception were on the part of the lessor alone, he cannot avail himself of his own fraud, and cannot be aided by the court to obtain a possession not given to him under the bill of sale so procured by him.

ID.—DAMAGES—COUNSEL FEES.—Counsel fees not paid can in no case be recovered as damages; but the prevailing party in an action of replevin cannot recover counsel fees, even though paid, as damages for the taking and withholding or detention of the property, or for its conversion, where no other expense than counsel fees appears to have been incurred in the pursuit of the property.

ID.—PURSUIT OF PROPERTY—OPINION AS TO DAMAGES—PARTICULARS NOT STATED.—The opinion of a party that he has been damaged in a specified sum for trouble and expense and time consumed in the pursuit of the property, without the statement of particulars on which the opinion is based, is not sufficiently certain to justify damages for pursuit of the property.

APPEAL from a judgment of the Superior Court of Yolo County and from an order denying a new trial. F. T. Nilon, Judge presiding.

The facts are stated in the opinion of the court.

R. Clark, for Appellant.

W. H. Grant, for Respondents.

THE COURT.—Plaintiff brings the action to recover the possession of certain grain of which he alleges ownership and right of possession. The cause was tried by the court without a jury and defendants had judgment, from which and from the order denying a new trial plaintiff appeals.

It was alleged in the separate answers of the defendants that defendant Ewell Windsor and Stirling P. Windsor, his brother, deceased husband of defendant Alice Windsor, were copartners and tenants of plaintiff under a farming lease for the cropping season 1895-96, whereby plaintiff was to receive one-half of the grain raised as compensation for the use and occupation of plaintiff's land; that in March, 1896, Stirling died and defendant Alice became administratrix of his estate, which is still unsettled, but to the whole of which she is entitled, it amounting to less than fifteen hundred dollars in value; that said copartnership was indebted to sundry persons beyond its assets, and that the crop in question was the only property of any considerable value owned by the partners; that defendant Ewell Windsor was the sole surviving partner and as such entitled to settle up the business of the copartnership; that in May, 1896, plaintiff falsely and fraudulently, and with the intention of deceiving and defrauding these defendants, represented to them that the property in the complaint described was about to be attached by creditors of defendants; that he (plaintiff) had consulted with an attorney in the interest of defendants, and had been advised by him that it would be to the advantage of these defendants and each of them if they would execute a bill of sale conveying said grain, and that by so doing their property would be protected from such threatened attachment; that if such a bill of sale should be executed and delivered by these defendants to plaintiff, no one need know anything about it unless some creditor should attach said property; that the plaintiff is the father of the defendant Alice Windsor, and as such these defendants relied upon him and believed the aforesaid false and fraudulent representations, and in consequence thereof executed to the plaintiff herein a bill of sale of said goods and chattels, and plaintiff bases his claim thereto on said bill of sale, and not otherwise; that

there was no consideration for said pretended sale, and it was mutually agreed by the parties thereto at the time of its execution that there should be no change of possession of said grain, nor any delivery or transfer thereof, but that the property should remain in the possession of defendants; that up to the commencement of this action defendant Ewell Windsor, as surviving partner of the firm of Windsor Brothers, has kept and maintained exclusive possession of said property.

Defendants prayed for a return of the property, or, if delivery could not be made, that they have judgment for the value. The action was commenced on July 27, 1896, on which day part of the grain was in warehouse, part in sacks in the field, and part being harvested. The sheriff took possession under the writ, and by agreement defendants continued harvesting the grain and the sheriff took actual possession as fast as harvested. He testified: "On the 16th of November, 1896, the parties entered into a stipulation authorizing me to sell the grain, and turn over to the clerk of this court all the proceeds of the sale to abide the termination of this action," amounting in all to thirteen hundred and fifty-seven dollars and thirty-four cents. The court found the foregoing allegations of the separate answers to be true. The court also found that plaintiff was never in possession of the property, and that at the commencement of the action defendant Ewell Windsor was in possession and so remained until possession was taken by the sheriff in this action; also that plaintiff did not demand possession of the property before commencement of the action or at any other time, nor did defendants refuse to deliver possession.

The bill of sale reads as follows:

"To whom it may concern:

"That we, the undersigned, have for the sum of five hundred dollars this day paid to us sold to Wm. Hays all our interest in the growing crop on the (land described), April 15, 1896.

"EWELL WINDSOR.

"ALICE WINDSOR."

1. There is no pretense that there was any consideration for the sale, other than it appears that plaintiff was surety on

a note executed prior to the copartnership of Windsor Brothers by Stirling Windsor, no part of the proceeds of which went into the partnership or in producing the crop in question. This note was unpaid at the time and still is unpaid either by the principal or the surety. Defendant Ewell Windsor testified: "Neither I nor the partnership owed him [plaintiff] anything. He first spoke to me about making him safe the day of my brother Stirling's funeral, March 21, 1896, I believe, and that was the first time he said to me that creditors would 'jump upon me' as soon as they learned of Stirling's death; afterward he spoke of the bill of sale; it was his proposition, and when he made it he said that McCullough (who held a crop mortgage on part of the crop) was the only man who was safe, and the other creditors would jump on me. He asked me if I would not as soon see him safe [on his surety debt for Stirling] as the other fellows. I told him yes, and I said I would see a lawyer about it when I went to town. He said that was not necessary, as he had a lawyer who would attend to it, and it would not cost us anything." It further appeared that he was the father of Alice and that defendants trusted plaintiff in the matter. Ewell testified: "I did not intend to defeat or defraud any creditor of myself or the firm. I only wished to stave off litigation until I could harvest and sell the crop, and then I thought I could pay off everything. But without that crop the partnership was hopelessly insolvent." The evidence was sufficient to sustain the findings of fact. Conceding, as is urged by plaintiff, that defendants had the right to secure him against possible loss by reason of being surety for Stirling's debt, defendants' testimony would warrant the conclusion that such was not their purpose or intention in making the bill of sale. The real and only object they had in view when the bill of sale was signed as they testified, was to prevent the property being wasted by litigation so that the creditors of the partnership could be paid. Mrs. Windsor testified: "Plaintiff first spoke to me about the bill of sale, as it would protect us until after harvest; he said that McCullough was the only man who was safe, and that the other creditors would 'jump on us.' There was no consideration for the bill of sale, and nothing was to be said about it unless the creditors should attach us.

It was simply to protect us until after harvest, when there would be money enough to pay all. We intended to pay all as soon as we could. I signed the bill of sale because I thought it would be best for all." Nothing was said to her about plaintiff being surety for her husband, and this fact did not enter into her action in the matter, nor did it furnish the motive for Ewell Windsor's signing the bill of sale. His testimony shows that his object was solely to avoid attachments and preserve the property for the partnership debts.

No consideration was paid for the bill of sale, and if there was fraudulent intent in making it, shared in by all the parties thereto, they would be *in pari delicto*, and what was said in *Ager v. Duncan*, 50 Cal. 325, would apply: "In such cases it is immaterial by which of the parties the fraudulent nature of the contract is disclosed to the court. As soon as the fraud is made to appear by either of the parties, the court will refuse to interfere and leave them as they were. In other words it will not enforce a contract founded on the mutual turpitude of the parties to it. And for the same reason, if the contract has been executed, the court will not aid either party to escape its consequences."

If the facts warrant the conclusion that defendants had no fraudulent intention of defeating payment to their creditors, but really intended by the transaction to make payment more certain, then the fraud and deception was on the part of plaintiff alone, and the rule laid down in *Vitoreno v. Corea*, 92 Cal. 69, would apply. It was there held that two persons may concur in an illegal act without being deemed *in pari delicto*. In the case cited the court said: "In this case the defendant alone was guilty of the fraud. He cannot avail himself of his own fraud as a defense. 'For no man shall set up his own iniquity as a defense, any more than as a cause of action.'" (Quoting Lord Mansfield in *Montefiori v. Montefiori*, 1 W. Black. 364.)

Whether, therefore, plaintiff and defendants were equally guilty of fraudulent intent, or whether defendants were innocent of such intent and plaintiff alone was guilty, plaintiff cannot recover. (See the subject discussed in Bump on Fraudulent Conveyances, secs. 442-44, and cases there cited.)

2. The court awarded one hundred and seventy-five dollars to defendant Ewell Windsor, and to defendant Alice Windsor one hundred and twenty-five dollars as damages, and gave judgment accordingly. Ewell Windsor claimed in his answer two hundred and fifty dollars for counsel fees, which he testified he had agreed to pay his attorney for services in this case, and he also claimed one hundred dollars for "trouble and expense" and for "time consumed in the pursuit" of the property. Alice Windsor employed the same attorney, and claimed for his services the sum of one hundred dollars, and also one hundred dollars "as special damages for the wrongful taking and detention of the property." In support of his claim for these items Ewell Windsor testified to an agreement to pay the above amount to his attorney, and as to the other item he testified: "I have lost a good deal of time, have been deprived of the possession of the crop, and have been delayed in the payment of my debts, and I think I have been damaged in that regard at least one hundred dollars." Mrs. Windsor testified to the employment of the attorney and her liability to pay him one hundred dollars, and claimed "further damages by delay and trouble in the further sum of one hundred dollars." This was all the evidence on these questions.

Appellant contends that there is no evidence to support the judgment for any special damages except as to attorneys' fees, and that there is no authority of law for the latter item.

Aside from the question as to attorneys' fees, the evidence fails to show with any certainty any damage for the pursuit of the property; at most it gives the opinion of defendants that they were damaged, but states no particulars on which the opinion is based.

In *Murphy v. Mulgrew*, 102 Cal. 547,¹ it was held that the giving of a note by plaintiff to his attorney for his services in a replevin action would not support a finding for money expended by plaintiff in the pursuit of the property. In the present case there was but an agreement to pay the attorney. But apart from this state of the evidence we do not think the prevailing party in a replevin action can recover attorneys' fees as damages for the detention or as dam-

¹ 41 Am. St. Rep. 200.

ages for taking and withholding the property (Code Civ. Proc., sec. 667); nor are such fees to be included as part of the damages to be measured by section 3336 of the Civil Code. In some jurisdictions counsel fees are allowed under certain exceptional cases (Cobbey on Replevin, secs. 920, 921; Wells on Replevin, sec. 576; Shinn on Replevin, sec. 651); but our statute is as follows: "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." (Code Civ. Proc., sec. 1021.) It was said in *Sanger v. Ryan*, 122 Cal. 52: "The code expressly provides for payment of attorneys' fees in foreclosure and contested election cases, enforcing mechanics' liens, partition cases, in probate matters and some others; and it was held in *Miller v. Kehoe*, 107 Cal. 340, that counsel fees may be allowed in equity in an action for the preservation or distribution of a fund where all parties have a common interest; but it was also said that the general rule is that even a successful party cannot recover counsel fees in an action either at law or equity, except in enumerated instances where they are expressly authorized by statute." (Citing *Williams v. McDougal*, 39 Cal. 85; *Salmina v. Juri*, 96 Cal. 418.) It was held in *Brooks v. Forington*, 117 Cal. 219, that "counsel fees are not costs or disbursements in the action allowed by the statute to the prevailing party." (Citing section 1021, *supra*.) The court said in *Spooner v. Cady*, 44 Pac. Rep. 1018 (not reported): "It has been strongly intimated by this court that money paid for attorneys in pursuit of property is not within the rule of damages declared by section 3336 of the Civil Code." (Citing *Greenbaum v. Martinez*, 86 Cal. 462; *McDonald v. McConkey*, 57 Cal. 325.)

The judgment is modified by striking therefrom the items of damages, and in other respects it is affirmed, as is also the order, each party to pay one-half of the costs of appeal.

[L. A. No. 700. Department One.—October 5, 1900.]

F. J. GANAHL, Appellant, v. NANCY A. WEIR et al., Respondents.

MECHANICS' LIENS—PREMATURE PAYMENT TO CONTRACTOR—PLEADING —AMOUNT DUE CONTRACTOR.—In an action to foreclose the lien of a materialman, an averment in the complaint that a specified sum is due from the owner to the contractor which has not been paid, omitting credit of a premature payment made by the owner to the contractor, which, under section 1184 of the Code of Civil Procedure, has no effect as a payment, as against a lienholder, states the ultimate fact, and need not set forth the reason why the amount stated is due and unpaid in order to raise an issue as to the fact of premature payment.

ID.—INAPPLICABLE PROVISION—NOTICE TO OWNER TO STOP PAYMENT.—The provision in section 1184 of the Code of Civil Procedure which allows notice to be served upon the reputed owner to stop further payment to the contractor is inapplicable, and has no effect upon the other provision in that section that, as to liens, a premature payment to the contractor "shall be deemed as if not made, and shall be applicable to such liens, notwithstanding the contractor may thereafter abandon his contract."

ID.—DEFENSE TO FORECLOSURE—LIEN CLAIMED BY SURETY—INDEMNITY TO OWNER—FULL PAYMENT TO CONTRACTOR.—It is a sufficient defense to foreclosure of plaintiff's lien that, as surety on the contractor's bond, he agreed to indemnify the owner against all claims and demands, except the sum agreed to be paid to the contractor, regardless of the validity of the contract, and also consented that the contract might be modified without affecting his obligation, and that the contractor has in fact been fully paid by the owner.

ID.—PREMATURE PAYMENTS EFFECTIVE AS TO SURETY.—The rights of the surety are measured by the terms of his bond; and he cannot claim that premature payments made by the contractor were not effective as to him, so as to permit the enforcement of his claim of lien against the owner, who has fully paid the contractor, and who is indemnified by the bond against any other or further claim.

ID.—CONSENT TO MODIFICATION—CHANGE OF TIME OF PAYMENT.—The express consent in the bond to any modification of the contract, without affecting the obligation of the surety, includes the modification of a change in the time of payment to the contractor, and the surety has no right to complain of the time of any payment made by the owner to the contractor.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Walter Van Dyke, Judge.

The facts are stated in the opinion of the court.

Borden & Carhart, for Appellant.

Hester & Ladd, for Respondents.

GAROUTTE, J.—The plaintiff, a materialman, is seeking a lien upon the property of defendant Nancy A. Weir. The material was furnished to defendant Fellows, a contractor, who erected a building for said Weir. The contract between the owner and contractor was a valid contract, and the contract price was nineteen hundred dollars. Defendant Weir made the two last payments demanded by the terms of the contract before they were due, and plaintiff now insists that for this reason they should be deemed as never having been made, and that the amounts thereof should be applied to the payment of his claim. This contention is based upon section 1184 of the Code of Civil Procedure, which, among others matters, provides: "No payment made prior to the time when the same is due under the terms and conditions of the contract shall be valid for the purpose of defeating, diminishing or discharging any lien in favor of any person except the contractor, but, as to such liens, such payment shall be deemed as if not made, and shall be applicable to such liens, notwithstanding the contractor to whom it was paid may thereafter abandon his contract, or be or become indebted to the reputed owner in any amount, for damages or otherwise, for nonperformance of his contract or otherwise." Respondents insist that plaintiff's complaint is not sufficient to raise an issue as to the premature character of these payments, but with this contention we do not agree. The allegation is to the effect that there is now due to said contractor from the owner under the aforesaid contract four hundred and seventy-five dollars, and that the same has not been paid. This is the ultimate fact. The reasons why it is now due and has not been paid are not necessary to be stated in the pleading.

We also agree with plaintiff's contention that under the evidence and the law the amount of these premature pay-

ments was unpaid as to him when his claim of lien was filed. The language of the section quoted is plain and explicit. As to liens similar to that of this plaintiff the law declares: "Such payments shall be deemed as if not made, and shall be applicable to such liens notwithstanding that the contractor to whom it was paid may thereafter abandon his contract," etc. Respondents admit the force and effect of this law to a certain extent, but insist that the plaintiff gave no notice to the owner of his claim prior to the date when these payments became due, and hence he has not been injured. This contention is based upon the ground that the payments might have been made after they became due and still plaintiff would have been barred a recovery. The position of respondents is based upon another portion of section 1184, which allows a notice to be served upon the reputed owner by a materialman or other creditor, which has the effect of stopping the payment of further moneys to the contractor. That provision of the law is not applicable here, and in no way weakens or limits the effect to be given the other part of the same section which we have already quoted.

The second defense set up against this cause of action has merit. Appellant was a surety upon the contractor's bond. This bond was given to Nancy A. Weir, the owner of the building, and bound the contractor's sureties, one of whom was this appellant, to "save and keep the said Nancy A. Weir, or her heirs, executors, and administrators, harmless of and from all actions, costs, damages, disbursements, and counsel fees by reason of any claim growing out of said building to be erected as aforesaid, except the sum of nineteen hundred dollars agreed by said Nancy A. Weir to be paid for the construction thereof to Thomas Fellows on the completion thereof." The answer of appellant to this defense now is that the two premature payments should not be considered as part payments of the contract price, and therefore the entire contract price of nineteen hundred dollars has not been paid. This contention is untenable. The bond is measured and tested by its own provisions. It stand alone. The defendant Weir paid the contractor the full contract price as matter of fact. What results follow from a failure of the owner to comply with section 1184 of the Code of Civil Procedure is not material

upon matters pertaining to the bond. Premature payments amount to nothing in certain cases of lien claimants, but under all other circumstances they are payments in every sense of the word. And we are satisfied that Nancy A. Weir, as far as the bond is concerned, has fully paid to the said Fellows, or to his order, the full contract price of nineteen hundred dollars.

To make the foregoing conclusion absolutely certain we find the language of the bond to be: "It being expressly agreed that this bond is not attached to or made dependent upon the validity of said contract, but is a bond of indemnity, we hereby consenting that said owner and said contractor may alter, enlarge, or in any manner change such original contract without in any way affecting this obligation, but the same is to remain in full force and effect, the same as if no change or changes had been made." Here is a direct stipulation that the bond is independent of any question as to the validity of the building contract, and a further stipulation that its terms may be changed by the contracting parties without affecting its validity. If such a holding were necessary to support respondents' case it might well be said that the contract between the parties was modified by a change in the time of the payment of the contract price. This, the sureties expressly agreed might be done, and certainly they have no cause to complain if it was done.

For the foregoing reasons the judgment and order are affirmed.

Temple, J., and Harrison, J., concurred.

[L. A. No. 607. Department Two.—October 5, 1900.]

WILLIAM BRILL, Appellant, v. J. G. De TURK, Respondent.

BUILDING CONTRACT—PAYMENT OF BILLS—SUBSTANTIAL COMPLIANCE WITH LAW.—A building contract providing that "all bills for materials and labor, when indorsed by the contractor, will be paid on demand, provided said bills do not exceed seventy-five per cent of the whole value of materials and labor employed in the erection of the building to the date of the bills," and that a fixed sum, "upward of twenty-five per cent of the contract price, is to be paid thirty-five days after the building is completed," does not substantially depart from the provisions found in section 1184 of the Code of Civil Procedure.

ID.—ACTION ON CONTRACTOR'S BOND—VOLUNTARY PAYMENT OF LIENS BY OWNERS—EXCESS OF SUM DUE CONTRACTOR—SURETY NOT LIABLE.—The owner of the building, who neglected to avail himself of a valid defense to the foreclosure of liens filed in excess of the amount due the contractor, under a valid contract, and paid a judgment foreclosing the same, must be deemed to have made a voluntary payment of such excess, and cannot maintain an action to recover the excess so paid against a surety on the contractor's bond, whose liability covered only claims accrued against the building, and did not extend to the releasing of the building from invalid liens.

ID.—PLEADING—CONCLUSION OF LAW—RIGHT TO LIENS—IMMATERIAL ADMISSION—FACTS SUPPORTING JUDGMENT FOR SURETY.—An averment in the complaint in such action that the claimants whose liens were paid by the owner were entitled to their liens, is of a conclusion of law, and an admission thereof in the answer may be disregarded as immaterial. The validity of a judgment in favor of a surety cannot be affected by such averment and admission, but depends upon facts pleaded and found which support the judgment.

APPEAL from a judgment of the superior Court of Los Angeles County and from an order denying a new trial.
Lucien Shaw, Judge.

The facts are stated in the opinion.

F. M. Porter, J. W. Swanwick, and Lucien Earle, for Appellant.

Barclay & Camp, for Respondent.

GRAY, C.—This action was brought by the owner of the building on a building contractor's bond. Plaintiff had judgment by default against the builders, who were the principals on said bond. Defendant De Turk, the surety, answered, and after a trial without a jury obtained a judgment, from which and from an order denying a new trial plaintiff appeals. The bond sued on provided that the principals therein should faithfully keep and strictly perform all of the covenants of their contract, and well and truly pay, or cause to be paid, all just claims against them for the labor and materials performed and furnished. The building contract—attached to and made part of the complaint—was in the usual form, except that the provision for payment was "in the manner following: "All bills for materials and labor, when indorsed by the contractor, will be paid on demand, provided that said bills for material and labor do not exceed seventy-five per cent of the value of the material and labor employed in the erection of said building up to the date of said bills. Four hundred and ninety-five dollars (upward of twenty-five per cent of contract price) to be paid thirty-five days after building is finished and accepted."

1. It is contended that the above provision of the contract is in violation of those provisions of the mechanics' lien law found in section 1184 of the Code of Civil Procedure, reading as follows: "But the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work; provided, that at least twenty-five per cent of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract. . . . In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof."

We think there was no substantial departure from the statute in the quoted provision of the contract. The main purpose of the statute quoted is to secure to laborers, ma-

terialmen, and subcontractors their just compensation, and in this respect the contract goes even further than the statute, because, by its terms, there must be at all stages of the work at least twenty-five per cent of the value of the work and labor furnished unpaid to the contractor and still in the hands of the owner of the building. The safeguard intended by the statute is accomplished in the contract, and this is all that is necessary, because the penalty for a disregard of the statute attaches only when the contract does "not conform substantially to the provisions of this section." This is illustrated in the case of *Reed v. Norton*, 90 Cal. 590, in which the contract provided that the owner would, upon the written order of the contractor, pay the materialmen for materials furnished as soon as the material should be actually worked into the building, and also pay the mechanics and laborers upon the building weekly; and it was held that the payments were specific enough as to time and amounts to comply substantially with the statute. (See, also, *Yancy v. Morton*, 94 Cal. 558.) We cannot see how the prospective lien claimants could derive any advantage from a contract following the letter of the statute that they do not enjoy under this contract. "Every reasonable intendment is indulged to avoid a penalty." (*San Diego Lumber Co. v. Wooldredge*, 90 Cal. 579; *West Coast Lumber Co. v. Knapp*, 122 Cal. 79.)

2. The amount to be paid for the building as fixed by the contract was nineteen hundred and seventy-five dollars. The complaint alleges that prior to the commencement of work the contract and bond were duly filed for record; that between the commencement and completion of the building the owner paid out in pursuance of the contract for material and labor thirteen hundred and sixty-one dollars and eighty-six cents. That, in addition to this, labor and material were furnished by various parties in the construction of the building to the aggregate amount of sixteen hundred and fifteen dollars and seventeen cents, and no part of this latter amount being paid by the contractors, liens were filed therefor on the building, and a suit was commenced against J. J. Brill and William Brill, plaintiff herein, to foreclose these liens. The defendants in that case employed counsel and filed an answer, and on the day set for the case to be tried the defendants (including the plaintiff

here) entered into a stipulation in accordance with which a judgment was entered against defendants therein for twelve hundred and forty-seven dollars and seventy cents. Said defendants thereafter, and before the commencement of the present action, paid said judgment and obtained a release of the property therefrom; and J. J. Brill assigned to this plaintiff all the claim that he might have against defendants herein by reason of the execution of the bond sued on. The court finds that the allegations of the complaint are true except the allegation contained in the fifth paragraph thereof to the effect that the parties therein mentioned and referred to, and who had furnished labor and material, were entitled to liens for the sums therein mentioned. The answer had admitted this allegation. This statement in the complaint that the lien claimants were entitled to their liens, and the admission in the answer of the truth of that allegation, may be disregarded as a mere conclusion and not material, because the judgment must depend for its validity upon the actual facts set forth in the complaint and found to be true. It is not contended that the contract was defective in any part other than in the provision concerning payments, and that, as we have already seen, is not in conflict with any substantial requirement of the statute. The contract being good under the statute, and having been duly recorded, it follows that the owner could be compelled to pay out no more than the contract price. On this appeal it is not contended that anything can be recovered in this action except the excess paid by plaintiff over and above said contract price which amounts to six hundred and thirty-four dollars and fifty-six cents. The appellant was under no legal obligation to pay this excess, nor does it appear that the contractor, whose debt it was, requested him to pay it. It is not shown, nor even contended, that appellant in any way succeeded to any rights of the lien claimants against the contractor or his sureties on the bond. There was no privity of contract between the owner and the laborers or materialmen, and the owner was not indebted to them and they certainly had no right to a lien for any amount which he did not owe the contractor. The obligations of the bond did not extend to the releasing of the building from invalid liens; but, in the language of the contract, such obligations only covered "claims that may

have accrued against the said building by reason of the aforesaid erection." Claims which could not be legally enforced against the building cannot be said to have accrued against it.

On the facts as they appear in the complaint appellant could have pleaded his contract and defeated the action against him to enforce a lien for the amount which he seeks in this action to recover from the defendant. Not having done so the payment must be treated as merely voluntary on his part, and he could not thus acquire a right of action against a surety which he did not have in the absence of such payment.

We think the conclusions reached by the court below are correct, and advise that the judgment and order be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Temple, J., McFarland, J., Henshaw, J.

[L. A. Nos. 666, 783. Department Two.—October 5, 1900.]

STATE LOAN AND TRUST COMPANY, Respondent, v.
W. G. COCHRAN et al., Appellants.

ACTION AGAINST SURETIES—STATUTE OF LIMITATIONS—WRITTEN REQUEST FOR DELAY—CONTRACT TO WAIVE STATUTE—ESTOPPEL.—Sureties sued upon a bond are estopped to plead the statute of limitations where, pending the running of the statute, they signed a written request for delay in proceedings against them, until they should request further proceedings, and agreed in writing to waive all advantage which might result from the delay requested, in consideration of which request and promise the plaintiffs forbore to sue for a period of years.

ID.—VALIDITY OF CONTRACT—CONSISTENCY WITH CODE—WRITTEN PROMISE.—The written contract to waive the statute of limitations was not in contravention of section 360 of the Code of Civil Procedure, but was a written promise within the language of that section, which took the case out of the bar of the statute.

ID.—RUNNING OF LIMITATION SUSPENDED—EXTENSION OF TIME.—Apart from statute, it is recognized law that if, pending the running of the statute of limitations, the time of payment is extended by

the creditor with the debtor's assent, the statute does not run during the time of the suspension.

- ID.—FORBEARANCE OF CREDITOR AT DEBTOR'S REQUEST.**—Where the creditor forbears to sue, upon the written request of the debtor, the debtor will be estopped to plead the statute, the running of which is suspended during the time of the forbearance as requested.
- ID.—PUBLIC POLICY—AGREEMENT FOR LIMITED TIME—MAXIM.**—An agreement to waive the statute of limitations for a limited time is not against public policy; but the general rule applicable thereto is embodied in the maxim, "*Pacta legem faciunt inter partes.*"
- ID.—CONSIDERATION—ACCEPTANCE OF PROMISE—COMPLIANCE WITH REQUEST.**—The mere acceptance of the naked written promise of the obligor to waive the statute would not make it a binding contract; but the compliance of the obligee with the obligor's written request for delay, upon the faith of the promise, constituted a sufficient consideration for the promise, and made it effective to suspend the statute while the parties acted as agreed.
- ID.—RECOMMENCEMENT OF STATUTE.**—The statute of limitations does not commence to run again from the date of the written promise, but only from the time when the parties have ceased to act upon it as agreed.
- ID.—SUBSTITUTION OF NEW SURETY—COSURETIES NOT RELEASED FROM AGREEMENT.**—The substitution of a new surety, who is not bound by the agreement of the other sureties to waive the statute of limitations, does not have the effect to release the other sureties from their agreement, or to make the limitation run from its date, or to render their obligation any different from what it would have been if the substitution had not been made.
- ID.—HARMLESS ERROR IN INSTRUCTION—MISCONSTRUCTION OF CONTRACT—PERIOD OF DELAY—SUSPENSION OF LIMITATION.**—An erroneous instruction, based upon a misconception of the contract, thereby shortening the time of agreed delay and making the statute run only from the expiration of that time, without including the time of the original delay, is harmless, without reference to the question of a mere suspension of the period of limitation, where it appears that, under a true construction of the contract, the period of agreed delay for all purposes was such as to preclude any successful plea of the statute.
- ID.—BOND OF BANK SECRETARY—COLLECTION OF COLLATERAL SECURITIES CHANGES BY BANK—CONSENT OF ONE SURETY BINDING UPON COSURETIES.**—Where the bank plaintiff, upon the bond of whose deceased secretary the defendants were sureties, during the period of delay requested by them, proceeded to realize upon the collateral securities of the deceased principal in its hands, the consent of one of the defendant sureties to changes in the disposition of the collateral securities held by the bank, including exten-

sions of time and renewals of notes, and compromises thereof, and payments in property, is binding upon all of the sureties, and none of them can claim any release from liability on the bond by reason of such proceedings.

ID.—POWER OF COSURETY—JOINT DEBTOR.—Though one joint debtor cannot, without the consent of his codebtors, make new contracts, or revive a debt barred by the statute of limitations, he has power to act for the others in reference to the contract by which the relation was created; and cosureties on the same bond have each power to act with reference to collateral securities given by the principal to the obligee of the bond.

ID.—INSTRUCTION AS TO POWER OF SURETY—CONDITION WITHOUT EVIDENCE—CHARGE OF COLLATERALS BY COMMITTEE OF SURETIES—HARMLESS ERROR.—An instruction correctly stating the power of one surety to bind the others by consent to the action of the bank in disposing of collaterals is not rendered prejudicially erroneous, because not given absolutely, but conditionally upon a finding by the jury that the bank appointed the sureties a committee to have charge of the collaterals, which finding there was no evidence to sustain.

ID.—NONSUIT—PROOF OF CAUSE OF ACTION—EXCESS IN VERDICT NOT PROVED—APPEAL—RELEASE OF EXCESS.—In an action against the sureties on the bond, proof that the secretary of the bank, the principal in the bond, loaned money of the bank to himself, the notes for which were renewed in another name, that unauthorized loans by him were not paid, that he misappropriated money of the bank received by him, and converted to his own use collaterals belonging to the bank, is sufficient to prevent a nonsuit, and to support a verdict against the sureties, except as to an excess not proved. Such excess must be released with interest, as a condition of affirming the judgment upon appeal.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

H. T. Gage, Gibbon & Halsted, and McKinley & Graff, for Appellants.

The acknowledgment or new promise to pay the debt provided for in section 360 of the Code of Civil Procedure is the only evidence to avoid the bar of the statute of limitations. (*Fairbanks v. Dawson*, 9 Cal. 92, 93; *Barron v. Kennedy*, 17 Cal. 577; *Pena v. Vance*, 21 Cal. 142; *Heintin v. Castro*, 22

Cal. 100; *McCormick v. Brown*, 36 Cal. 185¹; *Chabot v. Tucker*, 39 Cal. 437; *Biddel v. Brizzolara*, 56 Cal. 377; *Southern Pacific R. R. Co. v. Prosser*, 122 Cal. 415; *Curtis c. Sacramento*, 70 Cal. 416; *Tuggle v. Minor*, 76 Cal. 96.) An agreement beforehand to waive the statute of limitations is void, as contravening a law established for a public reason. (Civ. Code, sec. 3513; *Shain v. Sresovich*, 104 Cal. 406; *Bills v. Silver King Min. Co.*, 106 Cal. 22; *Harper v. Leal*, 10 How. Pr. 283; *Shapley v. Abbott*, 42 N. Y. 443²; *Crane v. French*, 38 Miss. 504.) The agreement was without consideration. (*Canal Co. v. Roach*, 78 Cal. 554.) The action is barred because brought more than four years from the date of the promise. (*McCormick v. Brown*, *supra*; *Joyner v. Massey*, 97 N. C. 148; *Crane v. French*, *supra*.) There is no equitable estoppel to plead the statute for want of the necessary elements of estoppel by conduct. (*McCormick v. Orient Ins. Co.*, 86 Cal. 260; *First Nat. Bank of Los Angeles v. Maxwell*, 123 Cal. 360³; *Barnhart v. Fulkerth*, 93 Cal. 499; *Lux v. Haggin*, 69 Cal. 266; *Murphy v. Clayton*, 113 Cal. 160; *McKeene v. Naughton*, 88 Cal. 467.) The act in declaration of one of the cosureties on this bond could not bind the others. (*Willoughby v. Irish*, 35 Minn. 67⁴; *Smith v. United States*, 2 Wall. 219; *Wolf v. Fink*, 1 Pa. St. 435⁵; *Wallis v. Randall*, 81 N. Y. 170; *City Nat. Bank v. Phelps*, 97 N. Y. 44⁶; *Crosby v. Wyatt*, 10 N. H. 318.)

Charles H. McFarland, for Respondent.

An agreed extension of credit suspends the statute of limitations. (*Frink v. Le Roy*, 49 Cal. 314.) A written agreement to waive the statute, or not to take advantage of delay, constitutes an estoppel to plead the statute of limitations. (*Jordan v. Jordan*, 85 Tenn. 561; 3 S. W. Rep. 896; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Webber v. Williams College*, 23 Pick. 302; *Rowe v. Thompson*, 15 Abb. Pr. 377; *Burton v. Stevens*, 24 Vt. 131⁷; *Kellogg v. Dickinson*, 147 Mass. 432; *Quick v. Corlies*, 39 N. J. L. 11; *Warren v. Walker*, 23

¹ 95 Am. Dec. 170.

² 1 Am. Rep. 548.

³ 69 Am. St. Rep. 64.

⁴ 59 Am. Rep. 297.

⁵ 44 Am. Dec. 141.

⁶ 49 Am. Rep. 513.

⁷ 58 Am. Dec. 153.

Me. 453, 457; *Hodgdon v. Chase*, 29 Me. 49; *Randon v. Toby*, 11 How. 493; Angell on Limitations, 113.) An agreement to forbear suit is for a reasonable time if no other time is fixed. (Wood on Limitations, 403-39; *Glasscock v. Glasscock*, 66 Mo. 627; *Williston v. Perkins*, 51 Cal. 554; *Vance v. Pena*, 41 Cal. 686; *Luckhart v. Ogden*, 30 Cal. 557; *Crocker v. Holmes*, 65 Me. 195⁸; *DeWolf v. French*, 51 Me. 420; *Nunez v. Dautel*, 19 Wall. 562; *Ubsdell v. Cunningham*, 22 Mo. 124; *Sears v. Wright*, 24 Me. 278.) The act of one of the co-sureties in consenting to the disposition of the collaterals of the deceased principal bound the other sureties. The act or admission of a joint debtor is competent against all as to any fact which does not tend to create a new contract. (Code Civ. Proc., sec. 1870, subd. 5; *Bank of United States v. Lyman*, 20 Vt. 671; *Bridge v. Gray*, 14 Pick. 61⁹; *Dickerson v. Turner*, 12 Ind. 230; *Barrick v. Austin*, 21 Barb. 242; *Martin v. Root*, 17 Mass. 222; *Dennie v. Williams*, 135 Mass. 28.)

THE COURT.—Appeals from a judgment on verdict in favor of plaintiff, for the sum of six thousand five hundred dollars and costs, and from an order denying a new trial.

The points relied upon for reversal are: The statute of limitations; errors of law occurring in the instructions, in denying motion for nonsuit, and in the admission of evidence; and irregularity in the proceedings of the court and jury. The last point, however, will not require an extended consideration. There was nothing in the casual remark of the judge calculated to influence the jury in giving their verdict. Our attention will therefore be confined to the other points.

The defendants (with another) were sued as sureties on the official bond of S. B. Hunt, as secretary of the plaintiff, for the term of a year from February 6, 1889. Hunt was re-elected at the expiration of his term and continued in office until his death in December, 1890. The breaches of the bond assigned consisted in the misappropriation of moneys of the plaintiff—of which the secretary was custodian—and are alleged to have occurred at various dates, some of them extending into his second term; but the bond was held by the

court to apply to the first term only, and a nonsuit granted as to causes of action subsequently accruing.

As to the statute of limitations: The suit was brought in the year 1897, more than seven years after the occurrence of the alleged breaches of the bond; but, pending the running of the statute, a written proposition was made to the board of directors by the defendants, which was accepted by a resolution of the board of the same date, and which reads as follows:

“Los Angeles, Cal., 1 July, 1892.

“To State Loan & Trust Company, a Corporation:

“We, the undersigned, hereby request that no further proceedings be hereafter taken for the collection of any of the obligations to the said corporation of the late Samuel B. Hunt, or his estate, or against the undersigned as sureties on the bond of said S. B. Hunt as an officer of this bank, until we request that such proceedings be taken. We agree to take no advantage of any such delays hereinafter incurred and to claim no release by virtue of any future delays occasioned by this request. We assume no new obligation or liabilities by signing this instrument except to waive any advantage to ourselves that might otherwise accrue to us by virtue of the delay that we hereby request in matter of said collection. This instrument is not to be construed and is not intended as an admission that any liability exists against any of the undersigned.

“JOHN BRYSON, Sr.

“W. G. COCHRAN.

“H. J. WOOLLACOTT.”

On September 13th of the same year (1892) the defendant, Sarah B. Hunt, by written agreement of plaintiff, herself and the appellant defendants, was substituted in the bond in the place of John B. Hunt, deceased, one of the original sureties. But it was held by the court on demurrer that, as against her, the plaintiff's cause of action was barred, and judgment was rendered in her favor.

Pursuant to the agreement the bank forbore to sue while engaged in realizing upon the securities and other assets held by it on account of Hunt, and afterward, pending negotiation with the defendants for a settlement, until some time

subsequent to March 10, 1896; at which date a letter was addressed to the defendants by a committee of the bank informing them that they had been appointed to take steps for the collection of the bond, and requesting a meeting with a view to settlement.

It was, in effect, held by the court—on demurrer and in instructing the jury—that the effect of the written proposition of the defendants and its acceptance by the plaintiff, and of the subsequent conduct of the parties, was to take the case out of the operation of the statute. Against this it is urged by the appellant (1) that the agreement to waive the statute was void as being in contravention of section 360 of the Code of Civil Procedure, and also (2) as being against public policy; (3) that there was no consideration for the agreement; and (4) that, even could the agreement be regarded as valid, the action was barred by the lapse of four years from its date, or, at least, by the lapse of four years from the substitution of Mrs. Hunt in the bond, which occurred September 12, 1892.

1. On the first point, it is assumed by the appellants that the means of avoiding the bar of the statute prescribed by section 360 of the Code of Civil Procedure are exclusive of all others; and they conclude that to take the case out of the operation of the statute there must be either an acknowledgment of the debt or an express promise to pay it. But neither the premise assumed nor the conclusion drawn from it can be admitted. With regard to the conclusion, the "promise" referred to is not necessarily a promise to pay the debt. A promise not to plead the statute comes equally within the language used; and (unless opposed to public policy—a point presently to be discussed) will equally operate to prevent the bar of the statute. Nor can the premise be admitted. The statute refers only to two of the recognized means by which the operation of the statute may be avoided—namely, acknowledgments and promises—and requires these to be in writing; there is nothing in it to imply an intent otherwise to alter the law. But apart from the statute, it has always been recognized law that if, pending the running of the statute, the time of payment is extended by the creditor with the assent of the debtor, the statute does not run during the time of the suspension; nor is it necessary that the contract

extending the time for payment be signed by the debtor. (*Smith v. Lawrence*, 38 Cal. 24.¹⁰) And so in many cases—as, e. g., where a creditor at the request of the debtor forbears to sue—the debtor will be estopped to plead the statute. (1 Wood on Limitations, sec. 76; *Randon v. Toby*, 11 How. 493, 517; *Burton v. Stevens*, 24 Vt. 131¹¹; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 656; *Gaylord v. Van Loan*, 15 Wend. 312; *Joyner v. Massey*, 97 N. C. 148; *Daniel v. Board of Commrs.*, 74 N. C. 497; *Haymore v. Commissioners, etc.*, 85 N. C. 268; *Barcroft v. Roberts*, 91 N. C. 363; *Webber v. Williams College*, 23 Pick. 302; *Bridges v. Stephens*, 132 Mo. 538.)

In the case last cited the authorities are very fully discussed. In the North Carolina cases, and also in the Missouri case, the principle is applied to cases where the request and waiver were not in writing; and on this point they are in conflict with *Shapley v. Abbott*, 42 N. Y. 448.¹² But this question does not concern us, as here the reliance is on a written document.

2. With regard to the policy of the law, there may be a question as to the validity of an agreement to waive the statute, made as part of the original contract, or a subsequent agreement to waive the statute for all time; and on this point we have authorities both ways. (*Crane v. French*, 38 Miss. 531, 532; *Quick v. Corlies*, 39 N. J. L. 11.) But in the former case—which holds such a contract to be against public policy—the validity of such agreements for a definite or limited time is admitted; nor has any case to the contrary been brought to our attention except that of *Wright v. Gardner*, 98 Ky. 454, which does not commend itself to our consideration. The general rule is embodied in the maxim, *Pacta legem faciunt inter partes*; and no reason, on the score of policy or otherwise, can be suggested why an exception should be made in this case. In this state, at least, the validity of such agreements must be regarded as established. (*Wells, Fargo & Co. v. Enright*, 127 Cal. 669.)

3. On the point of consideration, it is claimed by the appellant that the written proposition of the defendants and its

¹⁰ 99 Am. Dec. 344.

¹¹ 58 Am. Dec. 153.

¹² 1 Am. Rep. 548.

acceptance by the plaintiff did not constitute a valid contract binding on the latter; and this contention must, we think, be admitted. For the agreement of the plaintiff (if any) would be never to sue until requested by the defendants; which could not have been the intention of the parties. The mere acceptance of the proposition, therefore, did not constitute a consideration for the defendant's agreement to waive the statute. But it does not follow that a consideration did not subsequently arise. There was a written request from the defendants that proceedings should not be taken until requested by them, accompanied by a written promise or proposition (in effect) to waive the statute if the plaintiff would forbear legal proceedings; and upon familiar principles of law the subsequent compliance of the plaintiff with the request constituted a sufficient consideration for the promise. The case is, in principle, the same as the case put by Mr. Angell (*Angell on Limitations*, sec. 113, p. 99): "If A promises B to pay him a sum of money if he will do a particular act, and B does the act, the promise becomes binding, although B, at the time of the promise, does not engage to do the act. . . . Until the performance of the condition of the promise there is no consideration, and the promise is *nudum pactum*; but, on the performance of the promisee, it is clothed with a valid consideration, relates back to the promise, and it then becomes obligatory." (*Train v. Gold*, 5 Pick. 384.) So long, therefore, as the request and proposition of the defendants remained pending, the plaintiff was entitled to comply with it; and his compliance with it constituted a sufficient consideration for the defendants' agreement; and during the time the parties thus acted as agreed the running of the statute was suspended. (*Smith v. Lawrence*, *supra*.)

4. The statute, therefore, did not commence to run from the written request and proposition of the defendants, but from the time only that the parties or one of them ceased to act upon it, which was some time subsequent to the letter of the plaintiff to the defendants of March 10, 1896. Nor was the case affected by the substitution of Mrs. Hunt to the bond; for this was done by the written agreement of the plaintiff and defendants, and did not alter or affect their mutual relations. On this point the argument of the appel-

lants is that the plaintiff's action rests upon this agreement, and could not be maintained without it, "because the release of John B. Hunt would have released the other sureties." And "as the action rests upon this new agreement, the statute . . . runs from its date." But the release of Hunt, by operation of the statute—even in the absence of the written request not to sue—would not, it seem, have released the other sureties, even at common law (1 Parsons on Contracts, 29; *Ward v. Johnson*, 13 Mass. 151, 152; 20 Am. & Eng. Ency. of Law, 751); and, at least, could have no such effect under the code provisions. (Civ. Code, secs. 1432, 1543, 2819, 2823, 2840, 2848.) And were the law otherwise it would still have the same effect with reference to the substituted surety; so that the case is in no way different from what it would have been if the substitution had not been made.

As to the instructions: Several points are made on the instructions, which will be considered *seriatim*.

1. One of the grounds of objection relates to the defense of the statute of limitations, and has already been considered. But to prevent misapprehension, it may be well to say that we do not concur in that portion of the charge of the court (section 16) in which the jury was in effect instructed that if they believed the written request of the defendants made July 1, 1892, was made for the purpose of allowing time for the collection of securities in plaintiff's possession, etc., then that the action was not barred "if . . . begun within four years next after the completion of the collection and disposal of such notes and securities." It may be—though we do not decide the point—that, in such case, the effect of the agreement would be merely to suspend the operation of the statute (*Smith v. Lawrence, supra*); and that there would remain for bringing suit only the balance of the original four years after deducting the time of suspension. Nor are we satisfied that the contract is susceptible of the construction that it related, with reference to time, to the object specified—namely, the collection of the securities. Other purposes were also contemplated—as, e. g., the interests of the bank, and the delay contemplated beyond the time necessary for

realizing assets would still remain indefinite. In the view we have taken of the case, however, the error is immaterial.

2. The principal question involved in the case—besides that of the statute—is thus stated in the opinion of the court below, in a passage cited in the briefs of both parties:

“It was shown by the evidence that in the course of the bank’s administration of the securities received by the plaintiff upon the liabilities of Hunt it did not always proceed by the usual and regular legal process, but accepted payment sometimes in property at a fixed price, and sometimes exchanged one security for another, or released mortgages for less than their face value, or extended time of payment and renewed notes, much as an ordinary business man would do in the effort to convert into money assets of doubtful value. The jury were instructed in substance to the effect that if either one of the defendants consented or agreed to these various arrangements, dispositions, releases, renewals, and compromises, as they were made, such consent of one was binding upon all the joint debtors, and that those who did not consent could not claim a release from liability on the bond by reason of these proceedings of the plaintiff.”

We concur in this view of the law, and generally with the reasoning of the court as quoted in respondent’s brief. (1 Parsons on Contracts, *21-*27; Code Civ. Proc., sec. 1870, subd. 5.) It was on this ground that, at common law, the release of one of several joint obligors released all (2 Chitty on Contracts, 1154, note); and that a release by one of joint obligees bound the others. (1 Parsons on Contracts, *21-*27.) But the power of each of the parties interested to act for the others is confined to the contract by which the relation is created, and cannot extend to the making of new contracts. Hence, as held in many cases cited by the counsel and by the court, the admission or promise of one of several joint obligors cannot avail to revive as against the others a cause of action barred by the statute; or, perhaps, to suspend the running of the statute. Nor after the dissolution of a partnership can one of the parties, in general, make contracts for the other. But, in the latter case, each partner still has the power to act in closing up the business, and to that end may deal with the assets of the firm; and so, in the present case,

each of the sureties had the power to act with reference to the collaterals held by the bank.

3. The instruction we have been considering was not given absolutely, but conditionally only, upon the jury finding certain other facts to be true, among which was the fact, hypothetically stated, that "the defendants were appointed by the board of directors of said bank as a committee to take charge of such matter and realize the most that could be obtained from such collaterals for the benefit of the bank and the protection of themselves as sureties upon the bond"; and the balance of the instruction was conditioned on their finding to that effect. This is complained of by the appellants on the ground that there was no evidence "that the defendants were given charge of the collaterals, or had anything to do with the disposition of them"; and that the idea was thus conveyed to the jury that there was such evidence. There was in fact no such evidence, and this part of the instruction should not have been given; but the error was not one to be complained of by the defendants—as against whom the effect of the instruction given was simply weakened by the condition imposed on it. Nor, assuming the instruction to be otherwise correct (as we hold), is the fact material whether the defendants had charge of the collaterals or not. For the only materiality of the fact would be to show their assent to the manner of their disposition by the bank, and this under the instruction, was sufficiently shown by showing the assent of any one of them; and the assent of at least one was admitted.

As to the denial of nonsuit: One of the grounds of the motion for nonsuit was the bar of the statute of limitations, which has already been sufficiently considered. The others relied on relate to the first, fifth, seventh and eleventh causes of action set up in the complaint. We are of opinion that there was no ground for nonsuit with reference to either cause of action.

1. In the first cause of action the facts, so far as material to the motion, were that S. B. Hunt loaned to himself the money of the bank, in the several amounts specified, and that these were carried by him into the new note made in the name of South Rialto Land and Water Company, which was simply a renewal of his own notes; and these facts were

fully proved, which was sufficient to support the verdict. (Civ. Code, secs. 578, 2229, 2230.)

2. With reference to the fifth cause of action, the point is that it appeared from the evidence that the loan to Douglas—for which the plaintiff sought to charge the defendants—had been paid. But the evidence relied upon by appellant to establish this point is not very satisfactory; and there was other evidence that it had not been paid.

3. The seventh cause of action is for one thousand dollars, alleged to have been received by Hunt from Gerner, and to have been appropriated by him. It is claimed by the respondent's attorneys that there was evidence that this money was received and appropriated by Hunt as alleged "to at least the amount of eight hundred dollars"; and in this he seems to be sustained by the record. But this is an admission that the plaintiff failed to prove this cause of action as to the remaining two hundred dollars; and this amount, with legal interest from July 11, 1889, should be released.

4. With reference to the eleventh cause of action—which was for the conversion of three hundred shares of Simi Land and Water stock, given as collateral with the first note of the Rialto Land and Water Company—there was evidence tending to prove the fact alleged; which is sufficient to support the verdict.

As to other rulings of the court, we see nothing in them to justify a reversal. In most of them there was in fact no error; in others the error, if any, was immaterial. The case, on the whole, was fairly presented to the jury, except as pointed out with reference to the seventh cause of action; and whatever injury was done to the defendant by the error there occurring can be cured by a release of the excess unproved.

The judgment and order denying a new trial are therefore reversed, unless plaintiff, within twenty days after the filing of the *remittitur*, file with the clerk of the court a release of the sum of two hundred dollars, with legal interest from July 11, 1889. But, if such release be filed within the time mentioned, the judgment and order are to be affirmed. And it is so ordered.

A hearing in Bank was denied in each of the above appeals, and in the order denying a rehearing in appeal L. A. No. 783, the court in Bank, on the 3d of November, 1900, amended its judgment by ordering that the appellants recover their costs of appeals.

[L. A. No. 689. Department Two.—October 5, 1900.]

ANNE R. FAULKNER, Respondent, v. FIRST NATIONAL BANK OF SANTA BARBARA, Appellant.

PLEDGOR AND PLEDGEE—BAILMENT OF PLEDGED NOTES—COLLATERAL SECURITY—UNAUTHORIZED DELIVERY TO PLEDGER.—Notes pledged by the maker of another note to the payee, who indorsed the secured note to a bank, and deposited the pledged notes as collateral security, are subject to the rule declared in section 2996 of the Code of Civil Procedure, that "the pledge holder must enforce all the rights of the pledgee unless authorized by him to waive them." The bank, in such case, has no right, without the consent or authority of the original pledgee, to deliver the pledged notes to the pledgor.

ID.—ACTION FOR POSSESSION OR VALUE OF NOTES—PRIOR SURRENDER—PLEADING—DEMAND AND REFUSAL—UNLAWFUL DETENTION.—An action may be maintained by the pledgee against the bank for the possession or value of the pledged notes, notwithstanding their surrender to the pledgor by the bank prior to the commencement of the action, where the complaint avers the facts in regard to the deposit of the pledged notes, and alleges a demand upon the bank and its refusal to deliver them, and that it unlawfully withholds and detains them to plaintiff's damage in the alleged value of the notes.

ID.—DETINUE—TROVER—POSSESSION AT COMMENCEMENT OF ACTION NOT ESSENTIAL.—Such complaint states facts sufficient to constitute a cause of action both in detinue and in trover, in each of which actions possession of the subject of the action at the time of its commencement is not essential to recovery.

ID.—ACTION TO RECOVER PERSONAL PROPERTY—CLAIM AND DELIVERY—AUXILIARY REMEDY—PLEADING AND PRACTICE.—Claim and delivery, under our code, is not properly a form of action, but an auxiliary remedy provided for in an action for the recovery of personal property. Where the auxiliary remedy is not invoked in

such an action, the provisions for claim and delivery have no application, and the action must be governed by the ordinary rules of pleading and practice.

ID.—FORM OF ACTION—PLEADING—FACTS APPROPRIATE TO COMMON-LAW ACTIONS—PRINCIPLES APPLICABLE.—Though there is but one form of action in this state, yet when the facts stated in a complaint are substantially those required to support a particular common-law action, the principles of pleading and practice which apply to such common-law action, are applicable to the facts pleaded.

ID.—BAILMENT—UNLAWFUL DETENTION—COMMON-LAW ACTION OF DETINUE—INSUFFICIENT DEFENSE—DISPOSITION OF BAILED PROPERTY—BREACH OF DUTY.—The action in this case being based upon a contract of bailment, in which the original taking was lawful, but the detention was unlawful, the wrong is one for which the common-law action of detinue is especially appropriate. In such action, it was no defense that the defendant had voluntarily disposed of the bailed property before the commencement of the action, in breach of his duty as bailee.

ID.—CESSATION OF POSSESSION BEFORE SUIT—BURDEN OF PROOF.—In an action of detinue, where the possession of the bailed property had ceased before the commencement of the action, the burden of proof is upon the defendant to show that it ceased by accident, death, or by some means beyond his control.

ID.—ALTERNATIVE JUDGMENT IN DETINUE—POSSESSION OR VALUE—JUDGMENT FOR VALUE ONLY.—The usual judgment in an action of detinue is in the alternative, that the plaintiff recover the possession of the property, or its value, in case delivery cannot be had; but where it appears that delivery cannot be had, the defendant is not prejudiced by a judgment for the value only, without any alternative.

ID.—FACTS SHOWING CONVERSION—DEMAND AND REFUSAL—TROVER—JUDGMENT FOR VALUE.—Under a complaint stating a demand before suit for the possession of property to which the plaintiff was entitled, and a continuous refusal of the defendant to deliver the property, a conversion is shown, which supports a recovery, in the common-law action of trover, of a judgment for the value of the property converted.

ID.—DETENTION OF PROPERTY—IMMATERIAL AVERMENT IN TROVER.—In an action of trover, where the complaint is sufficient to support a judgment for value, an averment of the unlawful detention of the property is immaterial, and cannot invalidate the judgment.

ID.—RELIEF EMBRACED IN ISSUE—DEFENDANT NOT PREJUDICED.—Under the code, the court, upon the trial of an action, may grant any relief consistent with the case made by the complaint, and embraced within the issue; and where the issue related to the right of the defendant to surrender the pledged notes to the pledgor, and upon that issue the defendant had scope fully to present his

defense, he cannot be prejudiced by the averments of the complaint, nor by the form of the judgment in favor of the plaintiff for the value of the pledged notes unlawfully surrendered.

APPEAL from a judgment of the Superior Court of Santa Barbara County. W. S. Day, Judge.

The facts are stated in the opinion of the court.

Canfield & Starbuck, for Appellant.

An action to recover the possession of personal property cannot be maintained when the property is not in the possession of the defendant at the commencement of the action. (Code Civ. Proc., secs. 509, 667; *Riciotto v. Clement*, 94 Cal. 105, 107, 108; *Hawkins v. Roberts*, 45 Cal. 38.) An averment of demand and refusal is not an averment of a conversion, but of matter of evidence only. (*Balch v. Jones*, 61 Cal. 234; *Wood v. McDonald*, 66 Cal. 546; Webb's Pollock on Torts, ed. 1894, 436; Perry's Common Law Pleading, 92; 2 Greenleaf on Evidence, 15th ed., sec. 649.) No conversion was proved, there being no proof of immediate right of possession at time of the alleged conversion. (2 Greenleaf on Evidence, 15th ed., sec. 638; *Middlesworth v. Sedgwick*, 10 Cal. 392; *Ormsby v. De Borra* (Cal., March 4, 1898), 52 Pac. Rep. 499, 502.) The transaction in question was a contract of bailment. (Civ. Code, secs. 2986, 2987; *People v. Cohen*, 8 Cal. 42, 43; 3 Am. & Eng. Ency. of Law, 2d ed., 733.) The bank was the agent of the pledgee. (*Brewster v. Hartley*, 37 Cal. 15, 25, 26¹; Jones on Pledges, sec. 34.) The contract was subject to Beckman's reserved option of withdrawal and substitution. (*Hawkins v. Fourth Nat. Bank*, 150 Ind. 117; *Reid v. Wiessner & Sons Brewing Co.*, 88 Md. 234.) A contract may be made between the pledgor and pledge holder for the benefit of the pledgee. (Civ. Code, sec. 1559. No negligence of the bank is pleaded, and none is involved. An action to recover the possession of personal property cannot be joined with an action for conversion, and the demurrer of the defendant on that ground should have been sustained. (Code Civ. Proc., sec. 427, subds. 3, 7, sec. 430, subd. 5; *Kelly v. McKibben*, 54 Cal.

192, 195; *Riciotto v. Clement*, *supra*.) The demurrer for ambiguity as to the cause of action should have been sustained. (Code Civ. Proc., sec. 430, subd. 7; *Nevada County etc. Canal Co. v. Kidd*, 37 Cal. 282, 320; *Crow v. Hildreth*, 39 Cal. 618; *Jamison v. King*, 50 Cal. 132, 136.)

Richards & Carrier, for Respondent.

Detinue is proper action upon a contract of bailment, in case of an unlawful detention of the property. (*McLaughlin v. Piatti*, 27 Cal. 452, 465; *Garcia v. Gunn*, 119 Cal. 322.) A wrongful delivery by the bailee before commencement of the action is no defense in such action. (1 Chitty on Pleading, 6th Am. ed., 141; *Rucker v. Hamilton*, 3 Dana, 36, 45; *Haley v. Rowan*, 5 Yerg, 301²; *Woodruff v. Bentley*, 1 Hemp. 111; 30 Fed. Cas. 521; *Easley v. Easley*, 18 B. Mon. 86; *Timp v. Dockham*, 32 Wis. 146; *Nichols v. Michael*, 23 N. Y. 264³; *Burnley v. Lambert*, 1 Wash. (Va.) 308; *Kershaw v. Boykin*, 1 Brev. (S. C.) 301; *Lowry v. Houston*, 3 How. (Miss.) 394; *Lynch v. Thomas*, 3 Leigh. 694; *Hardy v. Moore*, 62 Iowa, 65; *Reave v. Palmer*, 5 Com. B., N. S., 91.) The complaint also states a cause of action in trover, which supports the judgment. (*Doyle v. Callaghan*, 67 Cal. 154; *Arzaga v. Villalba*, 85 Cal. 191; *Fuller Desk Co. v. McDade*, 113 Cal. 360; *Onderkirk v. Central Nat. Bank*, 119 N. Y. 263.) When the facts show that the possession of the property in kind cannot be restored, a judgment for the value of the property may be entered. (*Brown v. Johnson*, 45 Cal. 76; *De Thomas v. Witherby*, 61 Cal. 97; *Burke v. Koch*, 75 Cal. 356⁴; *Dennison v. Chapman*, 105 Cal. 447.)

McFARLAND, J.—The verdict and judgment were for plaintiff for the value of certain promissory notes averred to have been deposited by plaintiff with defendant as collateral security for a promissory note made to plaintiff by one Beckman and another person. Defendant appeals from the judgment and brings up the judgment-roll, which includes a bill of exceptions.

There are only two questions which need discussion, for we do not think that the minor points made in the briefs

² 26 Am. Dec. 268.

⁴ 44 Am. Rep. 542.

³ 80 Am. Dec. 259.

require special notice. These two questions are substantially: 1. Does the evidence support the verdict? and 2. Could the kind of judgment that was entered be properly rendered on the complaint and evidence in the case at bar?

As to the main issue of fact, which involves the real merits of the case, there is no doubt that at the time the note of Beckman was given the respondent—which was done at appellant's banking house—the notes in question were actually deposited with the appellant as collateral security for the said Beckman note; a statement of this fact was at the time written by the cashier of the appellant on the margin of the Beckman note. It is contended, however, by appellant that it was understood by appellant and by Beckman and the respondent that Beckman was to have the right, at his own option and without the consent of respondent, to withdraw any or all of said notes and substitute other collateral; but this was denied by respondent. There was substantial evidence on both sides of this issue. It would subserve no useful purpose to present that evidence here. It is sufficient to say that it was clearly conflicting within the rule on that subject, and that there is no warrant for saying that there was no sufficient evidence to justify the verdict of the jury. Connected with this matter there is a good deal of discussion by counsel of the relative rights of pledgors, pledgees, and pledge holders, both at common law and under our code provisions on the subject, commencing with section 2993 of the Civil Code; but if Beckman was the pledgor, the respondent pledgee, and appellant the third person with whom the property was pledged—as the jury had the right to find—then the case presents no difficult questions of law touching the subject; it is covered by the rule declared in section 2996 of the Code of Civil Procedure, that “the pledge holder must enforce all the rights of the pledgee, unless authorized by him to waive them.”

2. In the complaint the respondent, after the averment that she deposited the notes in question with the appellant, etc., avers that she demanded of appellant that it deliver the notes to her, and that the appellant refused, and ever since has refused to deliver said notes or either of them to her, and that defendant “still unlawfully withholds and detains the

same and each of them to the damage of plaintiff in the sum of four thousand six hundred dollars." The prayer is for the recovery of the possession of the notes, "or for the sum of four thousand six hundred dollars, the value thereof." It was proved at the trial that at the time of the commencement of the action appellant did not have the possession of the notes, but before that time had delivered them to Beckman. Now it is contended by appellant that the judgment was erroneous, because what appellant calls "an action of claim and delivery" cannot be maintained where the defendant is not in possession of the property sued for at the time of the commencement of the action.

Courts and law-writers have sometimes inadvertently spoken of the code "action of claim and delivery" as if there were really here a form of action called by that name—just as there were forms of action at common law, such as "debt," "covenant," "replevin," "trover," etc. But we have here no forms of civil actions. We have only one form of action, which has no name; so that an action cannot be here defeated, as it could have been at common law, because not properly named. Sections 509 to 520 of the Code of Civil Procedure are preceded by the heading "claim and delivery of personal property," but the sections themselves show the meaning of this heading. They merely provide an auxiliary remedy by which, when a party brings an action to recover personal property, he may "claim" that the property be immediately delivered to him at the commencement of the action and without waiting the trial. The first section (section 509) provides that "the plaintiff in an action to recover the possession of personal property may, at the time of the issuing of the summons, or at any time before answer, claim the delivery of such property to him, as provided in this chapter." All the other sections above referred to are merely concerned with the methods—as by affidavit, bond, etc.—by which the plaintiff may immediately take possession of the property. It is also provided how the defendant may retake the property. These sections merely give to a plaintiff suing to recover personal property an auxiliary remedy very similar to the auxiliary remedy of attachment given to a plaintiff suing upon a contract for the direct payment of money, and to the auxiliary remedy under the head of "ar-

rest and bail" and "injunction during litigation." But it is no more proper to speak of an action "of claim and delivery," than to speak of an action "of attachment." When a plaintiff in an action in which he seeks to recover personal property avails himself of the sections immediately following section 509, and takes immediate possession of the property at the commencement of the action, then certain relations and rights arise between him and the defendant which grow out of the exercise of the auxiliary remedy; and nearly all the decisions cited by counsel were in cases where the auxiliary remedy has been invoked. In such cases where the defendant has possession or control of the property he may, in some instances, be entitled to a judgment in the alternative so that he may satisfy it either by paying the value or returning the property itself. But in an ordinary action—like the one at bar—to recover personal property or its value, where the auxiliary remedy for taking possession at the commencement of the action is not invoked, it is clear that the provisions of the code above noticed have no application. The case at bar, therefore, must be governed by the general rules of pleading and practice.

The cause of action in the case at bar is based on a contract of bailment; the original taking was not unlawful, but the detention was. Now that is just the kind of wrong for which at common law the action of detinue was especially appropriate, and the averments in the complaint in the case at bar are substantially those required in such action. (3 Blackstone's Commentaries, 151; the form of declaration on page 38 of Stephen on Pleadings, 9th Am. ed., by Hurd; *Rucker v. Hamilton*, 3 Dana, 36.) While we have no forms of action here, yet when the averments of facts in a complaint show the case to be one for which a particular form of action would have been a proper one at common law, then the general principles of pleading and practice apply to it which apply to the special form of common law action. Now, it was no defense to the action of detinue to plead that the defendant, before the commencement of the action, had wrongfully disposed of the property, and, therefore, was not in possession of it. (1 Chitty on Pleading, 6th Am. ed., 138, and cases cited; *Rucker v. Hamilton*, *supra*; *Haley v.*

Rowan, 5 Yerg. 301; *Woodruff v. Bentley*, Hemp. 111; *Lowry v. Houston*, 3 How. (Miss.) 394; *Reeve v. Palmer*, 5 Com. B., N. S., 84.) In 1 Chitty on Pleading, 138, it is said, speaking of detinue: "Nor does it lie against the bailee if, beyond demand, he lose them by accident, though if he wrongfully deliver the goods to another he will continue liable." In *Rucker v. Hamilton*, *supra*, it is said: "As the object of detinue against a bailee is to recover the specific thing bailed, and enforce a specific execution of the contract of bailment, the fact that the bailee had wrongfully parted with the possession before the impetration of the writ should not, *per se*, defeat the action. Neither justice nor analogy would suffer such an invasion of law and frustration of contract. . . . The wrongful delivery by a bailee is any delivery to another in violation of his contract, or in consequence of which he cannot make specific restitution to the bailor. He is, of course, liable if he authorize or permit another to possess and detain the thing bailed." In *Lowry v. Houston*, *supra*, it is said: "In relation to the second objection it may be remarked that the rule is that, though possession by the defendant must be proved, yet it is not necessary that it shall be continued up to the time of the commencement of the suit, and the plaintiff will be entitled to recover unless the defendant has been lawfully dispossessed." in *Woodruff v. Bentley*, *supra*, the court say: "It is certainly a well-settled principle that detinue lies against a person who has quitted the possession of the property prior to the institution of a suit. . . . This doctrine, as was justly remarked by the counsel for the appellant, is founded in the best policy. Were it otherwise, a door would be opened placing it in the power of corrupt individuals, by combining, to practice incalculable frauds and impositions upon society. Besides, it would greatly impair the beneficial relations growing out of contracts for hiring or any other species of bailment." In *Haley v. Rowan*, *supra*, the court say: "The question arising is, whether the action of detinue will lie when a defendant had parted with the possession before demand and suit brought. The court charged in the affirmative of the proposition. On examination of authorities we are of opinion that the charge was right." (Quoting authorities.) The same principle obtains in England; in *Reeve*

v. Palmer, supra, Cockburn, C. J., says: "It has been held from a very early time that where a chattel has been bailed to a person it does not lie in his mouth to set up his own wrongful act in answer to an action of detinue, though the chattel has ceased to be in his possession at the time of the demand." Williams, J., says: "I am of the same opinion. All the authorities, from the most ancient times, show that it is no answer to an action of detinue, when a demand is made for the redelivery of the chattel, to say that the defendant is unable to comply with the demand by reason of his own breach of duty." And in the American notes to this case it is said: "In general, and according to the current of the American authorities, possession being once established in the defendant it is not necessary that it always be shown to exist at the date of the writ. The burden of proof in such cases is on the defendant to show that the possession has ceased before suit brought, by accident, death, or by some means beyond his control." (Citing many authorities.) The principles declared in the foregoing authorities are eminently just, and are founded on the maxim that no one can take advantage of his own wrong; and they are as applicable now to an action based on a contract of bailment as they were to such an action when it had to be brought under the special form of detinue. The usual judgment in such action is in the alternative—that is, that the plaintiff recover possession of the property, or its value in case delivery cannot be had; but where it appears that the property cannot be delivered the defendant is in no way prejudiced by a judgment for the value only; and the fact that the judgment is not in the alternative is no ground for reversal. This has been expressly held by this court in *Brown v. Johnson*, 45 Cal. 76; *De Thomas v. Witherby*, 61 Cal. 92,⁵ and *Burke v. Koch*, 75 Cal. 356. *Riciotto v. Clement*, 94 Cal. 105, cited by appellant, was the ordinary case of a wrongful taking by a constable, and most of the other cases relied on were cases where the original taking was tortious; in those cases there was no discussion or consideration of a case like the one at bar, where the cause of action is founded on the contract of bailment, and to which the same principles will apply as were

⁵ 44 Am. Rep. 542.

applicable to the action of detinue. Those cases are, therefore, not determinative of the case at bar.

There is another feature of the case, however, which disposes of this technical point adversely to appellant. The averments in the complaint of the demand by respondent of the appellant that it deliver to her the property, and appellant's refusal to do so, are sufficient averments of conversion; and the action may therefore be considered in the nature of trover, and thus considered there can be no objection to the form of the judgment. "If defendant took plaintiff's property, and refused to return it on demand, there is a conversion, and the allegation of these facts sufficiently shows a conversion" (*Arzaga v. Villalba*, 85 Cal. 191); and the fact that it is alleged that appellant "unlawfully withholds and detains" the property does not invalidate the judgment. In *Hutchings v. Castle*, 48 Cal. 153, the court—we quote from the syllabus—say: "If, in an action of trover, the complaint, in addition to alleging a taking and carrying away the goods, avers a detention of the same, and it appears on the trial that the defendant had sold the goods before the suit was brought, and the plaintiff recovers judgment only for the value of the goods, the defendant is not injured by the allegation of the detention." (See, also, *Fuller Desk Co. v. McDade*, 113 Cal. 360; *Doyle v. Callagan*, 67 Cal. 154.) Therefore, under either view of the case, the judgment is proper. The case is very similar to that of *Dennison v. Chapman*, 105 Cal. 447, where it was said that "the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue." The real question in the case is whether the appellant had the right to surrender the notes to Beckman; and upon that issue the appellant had scope to fully present his defense, and it is entirely clear that he was not prejudiced in any way by the averments of the complaint or the form of the judgment.

3. As to the minor points in the case it is sufficient to say that we see no ground for a reversal of the judgment in the admission of evidence to show the state of Beckman's account with the appellant, or in the plea of the statute of limitations, or in the allowance of the amendment to the complaint complained of, or in the instructions to the jury given at the re-

quest of respondent, or to the modification of the instruction given at the request of appellant.

The judgment appealed from is affirmed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 1550. Department One.—October 6, 1900.]

BANK OF UKIAH, Respondent, v. HENRY MOHR et al.,
Appellants.

AGENCY—OSTENSIBLE AUTHORITY TO DRAW ON PRINCIPAL—EVIDENCE.—

Upon a review of the evidence as to the prior course of dealings between the parties, the defendants are held to have made the drawer of the drafts sued on their ostensible agent in drawing, presenting, and cashing such drafts, and that the plaintiff was not guilty of ordinary negligence, within the meaning of section 2334 of the Civil Code, in cashing them.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

F. J. Castelhun, for Appellants.

J. A. Cooper, for Respondent.

GAROUTTE, J.—One Kelting, doing business in Lake county, drew two drafts on defendants, living in San Francisco, who constituted a partnership dealing in livestock. These drafts were cashed by the Bank of Ukiah, upon presentation by Kelting, but defendants repudiated any liability upon them, and this action is brought by the bank to recover from defendants the amount of those drafts. The question is, Was Kelting the agent of defendants in drawing, presenting, and cashing these drafts? The trial court found that he was such agent, and rendered judgment for a recovery of the

money. This finding is now attacked as unsupported by the evidence.

We will not measure and test the evidence as to whether or not Kelting was the actual agent of defendants. For if the relation of actual agency did not exist between him and them, we are still satisfied the evidence is sufficient to establish an ostensible agency. It is shown that defendants gave Kelting blank draft books to use in drawing upon them for money to pay farmers in Lake and Mendocino counties for the purchase price of hogs, which were to be bought by Kelting and shipped to them; that under the arrangement between them, whatever that arrangement was, Kelting had done a large amount of business with defendants by purchasing hogs in the aforesaid counties, and shipping them to these parties at the city of San Francisco; that he had drawn hundreds of drafts upon defendants for such purchases, which had been honored by defendants, and honored before the hogs were delivered to them; that his dealings with defendants in that way amounted to forty thousand dollars, and extended over a period of many months; that no draft had ever been refused payment by defendants prior to this time; that it was generally supposed throughout the aforesaid counties that Kelting was buying hogs for defendants; and he, Kelting, had repeatedly made the statement; that Kelting, when he began doing business with the Bank of Ukiah, told the bank that he was buying hogs for defendants; that the drafts in controversy, and probably a hundred others that had gone before, were drawn on defendants and signed "J. A. Kelting, agent." It may be said that substantially all of these facts were known to plaintiff, and certainly many of them were known to defendants. Section 2300 of the Civil Code declares: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Weighing these facts in the balances furnished by the law as here declared, they are sufficient to support a finding of ostensible agency.

Defendants invoke section 2334 of the Civil Code, which reads: "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in

good faith and without ordinary negligence, incurred a liability or parted with value, upon the faith thereof." They now assert that plaintiff was guilty of ordinary negligence in parting with its money to Kelting. In view of the fact that defendants had theretofore paid to plaintiff hundreds of Kelting's drafts, drawn in the same way that these were drawn, we fail to see the soundness of the claim that plaintiff was guilty of ordinary negligence in paying these drafts.

Certain depositions were introduced in evidence against the objection of defendants that they had not been immediately transmitted to the clerk of the court after having been taken. We find nothing in the law demanding an immediate transmission.

A few objections are made to the admission of evidence which went to show the acts and statements of Kelting tending to establish his agency. We find no error in the rulings of the court to this point.

For the foregoing reasons the order appealed from is affirmed.

Harrison, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 1725. Department One.—October 6, 1900.]

J. W. LUCAS, Appellant, v. E. A. PROVINES et al., Respondents.

BOUNDARY BETWEEN ADJACENT LOTS—ADVERSE POSSESSION OF STRIP—FENCE—PRESCRIPTIVE TITLE.—In an action involving the ownership of a strip of land, depending upon a question of boundary between adjacent city lots, evidence showing that the defendant in 1863, immediately upon purchase of one of the lots, entered upon and took possession of the strip in controversy by the erection of a division fence which included it, under the belief that the strip was part of the purchased lot, and maintained such fence continuously thereafter, and that the plaintiff never had possession of the strip, though claiming it by conveyance

of the adjoining lot, is sufficient to support findings and judgment for the defendant, based upon adverse possession and a prescriptive title to the strip.

ID.—PAYMENT OF TAXES NOT INVOLVED.—Where a prescriptive title by adverse possession was complete prior to 1878, the amendment of that year to section 325 of the Code of Civil Procedure making payment of taxes an element of adverse possession has no application.

APPEAL—DEATH OF RESPONDENT AFTER SUBMISSION—JUDGMENT NUNC PRO TUNC.—Where a respondent dies after the submission of the cause, an affirmance of the judgment will be entered *nunc pro tunc* as of a date prior to the death.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Robert Ash, for Appellant.

Boyd & Fifield, for Respondents.

HARRISON, J.—The question involved in this appeal is the ownership of a strip of land in San Francisco, on the northerly line of Washington street, commencing one hundred and twenty-five feet west of Taylor, and having a frontage of two and a half feet upon Washington street, with a depth of sixty feet, being a portion of fifty-vara lot No. 817. Judgment was rendered in favor of the defendants, and the plaintiff has appealed.

Upon the easterly line of the strip of land there is a brick building running back from Washington street about thirty feet, which was erected in the year 1860, and from the northwest corner of this building a fence was built at the same time to the northerly end of the strip. Since 1856 the respondent E. A. Provines has been the owner and in the occupation of the eastern portion of fifty-vara lot No. 834, which lies directly west of and adjoining fifty-vara lot No. 817. In November, 1863, she became the owner of the westerly ten feet of fifty-vara lot No. 817, running back from Washington street ninety-eight feet. At that time there was no fence or mark of division between the lot so purchased by her and the easterly line of the above strip of land claimed by the appellant, and immediately upon her purchase she entered

upon and took possession of the whole intervening space, under the belief that it was included within her purchase, and she has since that time claimed and occupied the same as her own. In March, 1891, a conveyance was made to the appellant of a lot of land on Washington street, which included the strip in controversy; but he testified at the trial that he had never been in the possession or occupation of any part of the strip of land claimed by him.

This evidence fully sustains the finding of the court that the defendant E. A. Provines is the owner of the land in controversy, and that the plaintiff has no right, title, or interest therein. As this possession of the defendant commenced in 1863, and has been continuous since that date, her title to the land by adverse possession was complete prior to 1878, and the amendment to section 325 of the Code of Civil Procedure, making the payment of taxes an element of adverse possession, has no application. (*Webber v. Clarke*, 74 Cal. 11; *Woodward v. Faris*, 109 Cal. 12.)

The judgment and order are affirmed, and, the respondent E. A. Provines having died since the submission of the appeal, the judgment of affirmance will be entered as of September 1, 1900, *nunc pro tunc*.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 1560. Department One.—October 6, 1900.]

R. D. DUKE, Respondent, v. W. V. HUNTINGTON et al.,
Appellants.

CORPORATION ACTION AGAINST STOCKHOLDER—PLEADING—CREATION OF INDEBTEDNESS OF CORPORATION—BALANCE DUE—AMBIGUITY—WAIVER.—An averment in a complaint against a stockholder for his proportionate share of the indebtedness of a corporation that the corporation became indebted in a certain amount on a specified day, being a balance due for certain work, is a sufficient averment of the creation of the indebtedness on the day specified as against a general demurrer; and the statement as to its being a balance due creates only an uncertainty or ambiguity as to the

mode in which the indebtedness was incurred, which is waived by failure to demur on that ground.

ID.—AVERMENT OF COMMON OWNERSHIP OF STOCK—EVIDENCE AND FINDING OF EXCLUSIVE OWNERSHIP.—An averment that a certain amount of stock was held in common by the defendant and others when the indebtedness was incurred, warrants the admission of evidence, and a finding based thereon, that that amount of stock was then entirely owned by the defendant.

ID.—IMMATERIAL VARIANCE—AMENDMENT OF COMPLAINT NOT REQUIRED.—The variance, in such case, between the pleading and the proof, not being such as to mislead the defendant in maintaining his defense, was immaterial, and the court was authorized to find the fact according to the evidence, without an amendment of the complaint.

ID.—OWNERSHIP OF STOCK IN NAME OF ANOTHER.—Under section 322 of the Civil Code, a stockholder is liable for his proportionate amount of the indebtedness of the corporation, not only for the stock standing in his name on the books, but also for all of the stock owned by him which stands on the books in the name of another person.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George H. Bahrs, Judge.

The facts are stated in the opinion of the court.

C. P. Robinson, N. J. Manson, and H. H. Hotaling, for Appellants.

John E. Richards, for Respondent.

HARRISON, J.—Judgment was rendered in favor of the plaintiff and against the appellant for his proportionate share as a stockholder of the indebtedness of a corporation, and he has appealed therefrom. The court found, in accordance with certain allegations in the complaint, that on the first day of July, 1897, the corporation became indebted to the plaintiff's assignor in a certain sum of money, being a balance due for certain work done by said assignor at the special instance of the corporation, and for which the corporation agreed to pay that sum on demand; that the capital stock of the corporation is ten thousand shares, and that of said stock four thousand five hundred and eighty-six shares had ever since the sixth day of February, 1895, stood on the books of the corporation in the names of certain persons as trustees

(giving their names), but that during all that time the appellant has been the owner "of all of the said four thousand five hundred and eighty-six shares, and was the owner thereof during all of the time of the aforesaid indebtedness of the corporation to the plaintiff's assignor." Upon these findings judgment was rendered against the appellant for four thousand five hundred and eighty-six ten-thousandth parts of the corporation's indebtedness to the plaintiff.

The averment in the complaint that the corporation became indebted in a certain amount on the first day of July, 1897, was a sufficient allegation of the creation of the indebtedness upon that day, as against a general demurrer: The subsequent statement therein, "being a balance due for certain work," only created an uncertainty or ambiguity as to the character of the mode in which the indebtedness was incurred, but this was waived by a failure to demur upon that ground. (See *Whitehurst v. Stuart*, 129 Cal. 194.) The finding as to the amount of stock held by the appellant at the time the indebtedness was incurred is fully sustained by the evidence. The allegation in the complaint that this amount of stock was held in common by him and others authorized the admission of evidence and a finding thereon that it was owned entirely by him. The fact alleged, and to be shown by evidence, was the relation of the defendant to the corporation as a stockholder, and the amount of stock held by him at the time the indebtedness was incurred. It is not claimed that the variance between the allegation and the proof was such as to mislead the defendant in maintaining his defense, and under section 470 of the Code of Civil Procedure, the court was authorized to find the fact according to the evidence, without any amendment of the complaint.

Section 322 of the Civil Code makes the appellant liable for his proportionate amount of the indebtedness of the corporation, not only for the stock standing in his name upon its books, but also for all the stock of which he is the owner standing upon the books in the name of another.

The judgment is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 1531. Department Two.—October 6, 1900.]

J. EPPINGER et al., Appellants, v. JAY SCOTT, Respondent.

CLAIM AND DELIVERY—ALTERNATIVE JUDGMENT—TENDER OF PROPERTY—EXECUTION FOR VALUE—DENIAL OF MOTION FOR RECALL—APPEAL—RELIEF IN EQUITY.—Where the defendant in an action of claim and delivery recovered judgment for the return of the property or its value, and the plaintiff tendered the property and costs in satisfaction of the judgment, which was refused, and the defendant issued execution for its value, which the court refused to recall on plaintiff's motion, the plaintiff who has appealed from the order denying such motion may maintain an action in equity to enjoin further proceedings under the judgment pending the determination of the appeal.

Id.—EFFECT OF DENIAL OF MOTION—AUTHORITY OF EQUITY.—The denial of the motion to recall the execution in the action of claim and delivery gives to the court of equity the same authority to interfere as if the court in that action was powerless to render aid.

APPEAL from a judgment of the Superior Court of Fresno County. J. R. Webb, Judge.

The facts are stated in the opinion.

Dinkelspiel & Gesford, and L. L. Cory, for Appellants.

George E. Church, for Respondent.

GRAY, C.—A demurrer to the second amended complaint was sustained, and, plaintiff failing to further amend, defendant had judgment from which the plaintiff appeals.

The said complaint contained two counts. In the first is set forth, in substance, that in a claim and delivery suit commenced by plaintiffs against defendant judgment had gone in defendant's favor for the return to him of twenty-five thousand trays and three hundred sweat-boxes, or eighteen hundred and eighty-five dollars, the value thereof, in case a return could not be had, together with costs amounting to sixty-three dollars and fifty cents; that plaintiffs appealed from said judgment, and the same was affirmed by this court; that on the filing of the *remittitur* in the court below plaintiffs tendered to defendant and deposited with the clerk

of the court for defendant eighty-four dollars and fifty cents, being the amount of the costs with interest and accrued costs in said action; that said judgment, except as to the costs, contained no definite description of any property to be returned by plaintiffs, and decreed only that twenty-five thousand trays and three hundred sweat-boxes should be returned, without specifying the character and nature thereof, and is incapable and impossible of enforcement by reason of the uncertainty thereof; that notwithstanding said uncertainty the defendant caused an execution to issue upon the money judgment in said action and levied upon the property of said plaintiffs; that thereafter plaintiffs moved the superior court to recall said execution and to order said property to be released and to direct the clerk to enter satisfaction of the judgment, which motion was denied by order of said court, and from said order plaintiffs appealed; that said appeal is still pending and undetermined, and plaintiffs have no legal remedy to stay proceedings in the premises pending the final determination of said appeal.

The second count of the complaint is practically a repetition of the first, except that instead of setting forth and relying on the uncertainty of the judgment it alleges as follows: "That also on said thirteenth day of June, 1896, said plaintiffs tendered to said defendant and offered to return and deliver to him the twenty-five thousand trays and three hundred sweat-boxes, as specified in said judgment, and then and there and thereby to comply with the terms of said judgment in that behalf and in satisfaction thereof; and that plaintiffs have been ever since, and are now, ready and willing to return to said defendant said twenty-five thousand trays and three hundred sweat-boxes, and to comply in every particular with the terms and requirements of said judgment; that defendant then and there refused, and ever since has refused, and does still refuse, to accept said sum of eighty-four dollars and fifty cents and said trays and sweat-boxes, or any thereof, or to satisfy or cause to be satisfied said judgment aforesaid, and by reason of such refusal, and not otherwise, said judgment still remains unsatisfied."

Then follows the allegations that thereafter, and notwithstanding said offer to satisfy said judgment, said defendant

caused an execution to issue; plaintiffs moved to recall the same and appealed from the order denying such motion, etc. It is also alleged in the second count, as well as in the first, that notwithstanding the pending appeal from said order defendant gives out that he will, under said execution, sell the real and personal property of plaintiffs in satisfaction of said judgment, and plaintiffs allege that unless restrained by the court said defendant will sell the same, to plaintiff's irreparable damage and injury.

The complaint prays that it may be decreed by the court that said judgment has been fully satisfied by plaintiffs, and that said defendant be required to enter or cause satisfaction thereof to be entered upon the records of said Fresno county. That said defendant be restrained and enjoined from proceeding in any manner under said judgment, and that all proceedings under said execution be stayed by the court pending the appeal, and for general relief.

We think this complaint shows good ground for the exercise of the equitable jurisdiction of the court, and that the demurrer to it should have been overruled. (*Thompson v. Laughlin*, 91 Cal. 318; *Bibend v. Kreutz*, 20 Cal. 110; *Carpentier v. Hart*, 5 Cal. 406; *Meyer v. Tully*, 46 Cal. 70; *Little Rock etc. Co. v. Wells*, 61 Ark. 354¹; 30 L. R. Ann. 560, and note; *Worden v. Jones* (Kan. App., July 16, 1895), 40 Pac. Rep. 1071; *McClelland v. Marshall*, 19 Iowa, 561.²)

It is contended by respondent that plaintiff had a remedy in the claim and delivery suit by motion to recall the execution and satisfy the judgment (Code Civ. Proc., sec. 675), and, this being a plain, speedy, and adequate remedy, plaintiff is not entitled to have the equitable remedy of injunction. Cases are cited in support of this contention, but the complaint here shows that plaintiffs have already exhausted their remedy by motion, without avail, so far as the court below is concerned, and to quote from *Merriman v. Walton*, 105 Cal. 408³: "The rule under which a court of equity declines to interfere until after the application for relief has been made to the court in which the judgment was rendered has

¹ 54 Am. St. Rep. 216.

² 45 Am. St. Rep. 50.

³ 87 Am. Dec. 454.

no application when relief has been sought and denied in that court. The denial of that court to grant relief gives to the court of equity the same authority to interfere as if the other court was powerless to render aid." (See, also, *Thompson v. Laughlin, supra.*)

It is not necessary to determine whether the judgment in the claim and delivery case is void for want of a definite description of the property, for, treating the judgment as valid on its face, the other facts alleged in the complaint make a *prima facie* case for relief in equity.

The judgment should be reversed, with directions to the court below to overrule the demurrer to the second amended complaint.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed, with directions to the court below to overrule the demurrer to the second amended complaint.

Henshaw, J., McFarland, J., Temple, J.

[L. A. No. 911. In Bank.—October 6, 1900.]

CITY OF LOS ANGELES, Appellant, v. C. H. HANCE,
City Clerk, Respondent.

MUNICIPAL CORPORATION—ELECTION FOR ISSUANCE OF BONDS—MANDATORY ORDINANCE—MISDIRECTION TO VOTERS—CLERICAL ERROR—CONTROL OF BALLOTS.—At an election for the issuance of the bonds of a municipal corporation for public improvements, the ordinance providing for the manner of voting is mandatory, and must control the voters, notwithstanding a misdirection to them caused by a clerical error in drafting the ordinance.

ID.—VOTE UPON HIGH SCHOOL AND GENERAL PUBLIC SCHOOL BONDS—CONTRARY DIRECTION IN ORDINANCE—CARRIED VOTE DEFEATED.—Under an ordinance providing for high school bonds, "to be voted for or against as 'general public school bonds,'" and for bonds for public school buildings other than a high school, "to be voted for or against as 'high school bonds,'" the contrary directions in the ordinance are deemed to be followed by the voters, and where the "high school bonds" on the ballots cast are defeated, and

the "general public school bonds" on the ballots are carried, no bonds can be lawfully issued for public school buildings, other than a high school.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank F. Oster, Judge presiding.

The facts are stated in the opinion of the court.

Walter F. Haas, and Lee & Scott, for Appellant.

Frank James, for Respondent.

HARRISON, J.—The city of Los Angeles took certain proceedings for the issuance of municipal bonds for public improvements, under the act of March 19, 1889 (Stats, 1889, p. 399), and adopted an ordinance submitting to the voters of the city the question whether the bonds should be issued. The city council, having declared that a majority of two-thirds of the voters had voted in favor of their issuance, passed an ordinance for their issuance and sale. Bonds were thereupon prepared and signed by the mayor and treasurer, as required by the ordinance, and presented to the respondent, as clerk of the city council, with the demand that he countersign the same and affix thereto the corporate seal of the city. Upon his refusal so to do this proceeding was instituted for a writ of mandate compelling him thereto. The superior court denied the application for the writ, and the city has appealed.

The proceedings had by the city council were as follows: July 7, 1899, the city adopted an ordinance declaring that the public interest and necessity demanded the following municipal improvements: 1. The acquisition of land and the construction thereon of a high school building, of which the estimated cost was two hundred and twenty thousand dollars; 2. The acquisition of land and the construction thereon of public school buildings, other than a high school, of which the estimated cost was two hundred thousand dollars; and that the cost of such improvements was too great to be paid out of the ordinary annual income and revenue of the city. After these ordinances had been published for two weeks the city council, on July 24th, adopted another ordinance providing for the holding of a special election for

the purpose of voting for or against the issuing of bonds for the payment of the cost of these improvements. In this ordinance the council declared its intention to submit to the qualified voters of the city the proposition of incurring a bonded indebtedness as follows: 1. Bonds in the amount of two hundred and twenty thousand dollars for the purpose of acquiring land and constructing thereon a high school building, "said bonds to be voted for or against as 'general public school bonds' "; 2. Bonds in the sum of two hundred thousand dollars for the acquisition of land and the construction thereon of public school buildings other than a high school, "said bonds to be voted for or against as 'high school bonds' "; and ordered that a special election be held August 22d for the purpose of submitting to the voters the proposition of incurring a bonded indebtedness for those purposes. The ordinance also declared:

"The ballot to be used at said election shall read as follows:

For the issuing of High School Bonds.
Against the issuing of High School Bonds.
For the issuing of General Public School Bonds.
Against the issuing of General Public School Bonds.

"Voters voting at said election shall indicate their choice by stamping a cross (X) in the square at the right of the affirmative or negative of the proposition to be voted upon."

This direction and form of ballot was repeated in the notice calling the election, but neither the ordinance nor the notice specified, other than as above shown, upon which of the two propositions the several ballots given in the above form were to be cast. The omission to thus designate which of the forms of ballots was to be used upon the respective propositions left the previous direction in the ordinance the only guide to the voter in determining how he should vote upon

either of the propositions. It is difficult to conceive the motive which prompted the city council to direct the ballots to be cast in this form, or why a voter who was to vote for incurring an indebtedness for the public schools generally should be required to vote "for the issuing of high school bonds"; and it is very likely that it was a clerical error in drafting the ordinance. But the voter had no alternative than to vote upon the proposition in the manner which had been prescribed in the ordinance. (*Murphy v. San Luis Obispo*, 119 Cal. 624.)

Upon the canvass of the votes cast at the election it was found that fourteen hundred and twenty-four votes had been cast for the issuing of high school bonds, and eleven hundred and sixty-three votes against the issuing of high school bonds; and that two thousand and thirty-five votes were cast in favor of issuing general public school bonds, and five hundred and seventy-nine votes against issuing general public school bonds. The city council thereupon passed an ordinance for the issuance of bonds in the sum of two hundred thousand dollars for the acquisition of lands and the construction of public school buildings thereon, other than a high school, each of said bonds to be entitled "general public school bond," and directing that they be sold, and the proceeds thereof placed in the "general public school bonds fund." The bonds thus directed are the ones which were presented to the respondent to be countersigned and sealed by him.

As it appeared upon the canvass of the returns of the election that the proposition for incurring an indebtedness for the acquisition of lands for public school buildings other than for a high school, received less than two-thirds of the ballots cast in the form which had been prescribed by the ordinance, the proposition was defeated, and there was no authority for issuing the bonds in question. Upon the "proposition" submitted to the voters for incurring an indebtedness for the purpose of acquiring land and constructing thereon public school buildings other than a high school, they could cast their ballots only in the form prescribed in the ordinance, viz.: "For the issuing of high school bonds," or "Against the issuing of high school bonds." It is altogether probable that when the voters cast their ballots in favor of issuing "general public school bonds" they intended to authorize the incurring of an indebtedness for the construction

of ordinary public school buildings, but this is only conjecture, and for the purpose of determining the intention of the voter in matters of this nature conjecture can never supersede the construction to be given to the intention, which he indicates by his compliance with the mandatory direction in which he is required to vote. (*Murphy v. San Luis Obispo, supra.*)

As the bonds tendered to the respondent were never authorized by the voters of the city, his action in refusing to countersign them was justified.

The judgment is affirmed.

Temple, J., McFarland, J., Garoutte, J., Van Dyke, J., and Beatty, C. J., concurred.

[Sac. No. 671. Department One.—October 9, 1900.]

In re LEVY & SCHWAB, and W. LEVY and S. SCHWAB,
in Insolvency. BANK OF WOODLAND, Appellant, v.
S. SCHWAB, Respondent.

INSOLVENCY—ASSIGNEE'S SALE—PURCHASE OF FIRM ASSETS BY INSOLVENT PARTNER—ENFORCEMENT OF CLAIM AGAINST COPARTNER.—A member of a firm, after an adjudication in insolvency of the firm and its members, and the surrender of the firm and individual assets, may enter into any legitimate business, and may make a lawful purchase for cash, not shown to be any part of the insolvent effects, of the books of account in favor of the firm, sold at public auction by the assignee, and may thereafter enforce a claim in favor of the firm against the estate of the insolvent copartner, and may, as a creditor thereof, claim and receive a *pro rata* share out of his individual estate.

ID.—FRUITS OF PURCHASE—RESTITUTION OF PURCHASE MONEY.—It would be highly inequitable to deprive the member of the insolvent firm who made the purchase of the books of account at public auction of the fruits of his purchase, without restoring to him the amount of the purchase money paid therefor.

APPEAL from an order of the Superior Court of Yolo County directing a dividend out of the individual estate of an insolvent copartner. E. E. Gaddis, Judge.

The facts are stated in the opinion of the court.

N. A. Hawkins, for Appellant.

W. A. Anderson, R. E. Hopkins, and W. H. Grant, for Respondent.

VAN DYKE, J.—In December, 1894, the requisite number of creditors, among whom was the appellant, the bank of Woodland, filed a petition in the superior court of Yolo county to have the firm of Levy & Schwab, and the individual members thereof, W. Levy and S. Schwab, declared insolvent. Such proceedings were thereafter had upon the said petition that said firm and said individual members thereof were, on the twenty-fourth day of December, adjudged insolvent under the provisions of the act of 1895. Thereafter, in due course, the said insolvents filed a statement concerning their debts and liabilities, and a schedule and inventory of their estates, real and personal, as required by law. On the sixth day of April, 1895, in pursuance of an order of the court, the assignee in such insolvency proceeding sold at public auction, among other effects of the insolvents, the books of account and accounts therein of said firm of Levy & Schwab, and at such sale the said S. Schwab purchased said books of account for the sum of four hundred dollars. Among these accounts was a claim against W. Levy individually. This claim so purchased by Schwab was allowed by said assignee as against the individual partner, Levy. Upon the coming on for hearing of the final account of assignee in March, 1898, the appellant, the Bank of Woodland, filed a contest and exceptions to the allowance of said claim of Schwab against the said estate of Levy. This contest was answered by Schwab, and upon hearing the court found in his favor and against the contestant. According to the account so settled and allowed the dividend upon the estate of Levy, individually, was two cents and nine mills on the dollar, and on the claim in favor of Schwab amounted to nine hundred and forty dollars and seventy-two cents.

This appeal is taken from that portion of the order adjudging the claim of Schwab to be true and just, and allowing him to participate in the dividend as against said debtor Levy.

It is contended by appellant that the dividend in question should have been ordered paid over to the account of the insolvent firm of Levy & Schwab, instead of being ordered to be paid to Schwab, the purchaser of the account of said firm. There is no pretense that the whole transaction of the sale and purchase by Schwab was not open and fair, nor is there any proof or showing of fraud on his part. Schwab had the same right as other purchasers, in open market, to bid in the books of account in question. Further, it appears that the money paid by him on such purchase was turned in by the assignee in his account as part of the proceeds of the sale of the effects of the insolvent firm, and was distributed among the creditors thereof, the appellant included. The insolvent law, as declared in its title, was enacted not only for the purpose of the protection of creditors and the punishment of fraudulent debtors, but also for the relief of debtors. After the insolvents had complied with the provisions of the law in turning over their property upon the adjudication of insolvency, there was nothing to prevent such insolvents from entering into any legitimate business.

It is not claimed that the money paid by respondent formed any part of the insolvent effects, or that it was not his to do with as he pleased. Creditors and others bid at the sale, but he overbid them, and, as a purchaser of the accounts, to that extent became creditor of the individual partner, Levy.

Under the circumstances it would be highly inequitable to deprive him of the fruits of his purchase, without at least restoring to him what he paid; and appellant has furnished us with no authority requiring such an act of injustice.

We think the action of the court below was correct, and the judgment appealed from will be affirmed.

Harrison, J., and Garoutte, J., concurred.

[Sac. No. 617. Department One.—October 22, 1900.]

J. G. MARTIN, Respondent, v. SOUTHERN PACIFIC COMPANY, Appellant.

HUSBAND AND WIFE—INJURIES TO WIFE—LOSS OF SERVICES—RIGHT OF ACTION BY HUSBAND.—A husband is entitled to recover for the damage sustained by him by reason of physical injuries inflicted on his wife through the negligence of the defendant, whereby he has been deprived of her services, and compelled to expend money as a consequence of such deprivation.

Id.—COMMUNITY PROPERTY—EARNINGS OF WIFE.—The services of the wife are a part of the earning power of the community, and the earnings received for her services constitute community property, as much as do the earnings received for the services of the husband; and for any wrongful act of another by which either husband or wife is deprived of the capacity to accumulate community property, the husband, as the head of the community, may maintain an action for damages.

Id.—EXPENSES INCURRED BY HUSBAND.—In such an action, the husband may recover the expense incurred by him for necessary labor and services substituted for the ordinary services of the wife.

Id.—NATURE OF INJURY—EXPERT EVIDENCE.—The character of the injuries sustained by the wife, their probable duration, and the medical care required for their alleviation, are proper subjects for the opinion of experts; and a physician who had attended upon the wife may testify as to the character of the medical attendance she would require in the future.

APPEAL from a judgment of the Superior Court of Tulare County and from an order refusing a new trial. Justin Jacobs, Judge.

The facts are stated in the opinion of the court.

Power & Alford, and Foshay Walker, for Appellant.

Charles G. Lamberson, for Respondent.

HARRISON, J.—The present action is brought for the recovery of damages sustained by the plaintiff by reason of injuries received by his wife while she was being conveyed as a passenger upon one of the trains of the defendant. It is alleged in the complaint that by reason of the negligence of the

defendant the injuries received by plaintiff's wife were permanent, and rendered her wholly unable to perform her usual work and duties, and that by reason thereof he has been, and will be through the remainder of her life, deprived of her services and compelled to provide medical aid and care for her. Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

The principal ground urged by the defendant in support of its appeal is that the plaintiff is not entitled to recover compensation for the loss of services of his wife; that the relation which under the common law existed between the husband and wife, by which the wife was in reality the servant of the husband, does not prevail in this state; that the code does not give to the husband a right to the services of the wife, and that, therefore, he cannot maintain an action for being deprived of them. It was shown at the trial that prior to receiving the injury she did the housework of the family without any assistance, and that since that time she had been unable to do any of it, and that the plaintiff had been compelled to employ other assistance for that purpose.

The right of the plaintiff to maintain the action does not depend upon the right of the husband to compel the wife to render such services, or upon the existence of any obligation upon her part to perform them, other than the obligation of mutual support which they contract toward each other. (Civ. Code, sec. 155.) The action is brought to recover compensation for the damage sustained by reason of the wrongful act of the defendant, whereby the plaintiff has been deprived of her services and compelled to expend money as a consequence of such deprivation. The services of the wife are a part of the earning power of the community, and the earnings received for her services constitute community property as much as do the earnings received for the services of the husband. If the injury had been received by the husband, it would not be contended that he could not recover for the damage sustained by the loss of his earning capacity. In either case, the earnings would be community property, and any act by which either husband or wife is deprived of the capacity to render services diminishes the capacity to accumulate community property. If the domestic services voluntarily rendered by the wife obviate the necessity of em-

ploying other assistance the amount of the community property is thereby enhanced in the amount that would be required for such assistance, and by the deprivation of such services the community property suffers a corresponding damage. The husband, as the head of the community, has the right to maintain actions for damage to property sustained by the community, and the action of the court in admitting this evidence was correct, as was also its instruction to the jury that the plaintiff was entitled to recover the expense incurred by him for necessary labor and services substituted for the ordinary services of the wife. (*Tell v. Gibson*, 66 Cal. 247; *Redfield v. Oakland etc. Ry. Co.*, 112 Cal. 220.)

One of the physicians who had attended upon the wife, while testifying, was asked as to the character of the medical attendance which she would require in the future. This question was objected to by the defendant, on the ground that it was seeking to substitute the opinion of the witness for the conclusion which should be made by the jury, but the court properly admitted the testimony. The character of the injuries sustained by her, as well as their probable duration and the professional care required for their alleviation, were proper subjects for the opinion of experts. The plaintiff was entitled to recover for whatever damage could be shown as certain to result in the future (Civ. Code, sec. 3283;) and the testimony of the physicians who had attended upon her was a proper mode of establishing this fact.

The judgment and order are affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 1615. Department One.—October 24, 1900.]

WILLIAM NICOL, Appellant, v. CITY AND COUNTY
OF SAN FRANCISCO, Respondent.

PRACTICE—WANT OF PROSECUTION—DEATH OF ATTORNEY—DISMISSAL.—

The trial court has jurisdiction to entertain a motion to dismiss an action for want of prosecution, made at the instance of the defendant, after the death of the attorney for the plaintiff, when the plaintiff appears at the hearing by another attorney and contests the motion on its merits, notwithstanding the failure of the defendant to demand the appointment by the plaintiff of another attorney, or his appearance in person, as provided by section 286 of the Code of Civil Procedure.

ID.—LACHES IN PROSECUTION FOR FIVE YEARS.—A delay of upward of five years to take any steps toward the prosecution of an action warrants its dismissal for laches; and such delay is not excused by the facts that the plaintiff's time was entirely taken up with his other business affairs, or because he intrusted the conduct of the litigation entirely to his attorney, who was negligent in its prosecution.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. F. H. Dunne, Judge.

The facts are stated in the opinion of the court.

S. Bloom, for Appellant.

James L. Gallagher, and Harry T. Creswell, for Respondent.

GAROUTTE, J.—This appeal is before us from a judgment dismissing an action for lack of prosecution. The action is one for damages to real property, occasioned by reason of an overflowed sewer, and was brought in the year 1890. Issue was joined promptly, but the cause did not come to trial, and in the year 1898, upon motion of the city, the action was dismissed for laches in the prosecution. Two years after the action was brought plaintiff's attorney died, and nothing further was done in the matter until the present proceedings to dismiss were inaugurated.

The motion before the court was submitted upon the affidavits of plaintiff and defendant's attorney. Plaintiff first objected to the jurisdiction of the court to make any order

whatever in the premises, upon the ground that defendant had never served upon him the notice required by section 286 of the Code of Civil Procedure. That section provides: "When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person." In view of the fact that plaintiff upon April 7, 1898, appointed an attorney to represent him in the litigation, and that the hearing upon the motion to dismiss was not had until April 15th, there is nothing in the point made. He had an attorney at the hearing who represented him fully upon the merits of the motion, and in no degree is it claimed that he was injuriously affected by a failure to serve the notice required by the aforesaid section of the code. If the plaintiff had failed to appear at the hearing upon the fifteenth day of April, either personally or by attorney, then the lack of service of such a notice would probably have been good cause to justify the invoking of the aforesaid provisions of the statute. But when he did appear at that time, and by his attorney presented his affidavit going to the merits of the motion, and fully litigated the whole matter upon the merits, and question of lack of jurisdiction upon the part of the court to proceed with the hearing is eliminated from the case; and this, too, even though his attorney there made the preliminary objection that the notice contemplated by the statute had not been given.

As to the merits of the cause, this court will not disturb the judgment of dismissal. The trial court is vested with a large legal discretion in these matters, and, in the absence of a showing of abuse of that discretion, we will not interfere. The showing here is too weak upon the part of the plaintiff to justify us in setting aside the judgment. For at least five years plaintiff made no motion toward a prosecution of his action. Although he claims to have retained an attorney after the death of his first attorney, to look after his interests, yet it does not appear by his affidavit that he ever passed a single word with that attorney during those five years regarding the status of the case. His excuse for this conduct is found in the statement that his time was en-

tirely taken up in the transaction of his other business affairs, and that he depended wholly upon his retained counsel to care for his rights in the litigation. The circumstance that his counsel did nothing toward prosecuting the trial of the action avails him nothing. The counsel's negligence is his negligence; and the fact that he remained so indifferent to the condition of the litigation which he had inaugurated, that for five years he never made a single inquiry about it, fully justifies this court in upholding the decision of the trial court in directing an order of dismissal to be entered.

For the foregoing reasons the judgment is affirmed.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

[L. A. No. 493. In Bank.—October 24, 1900.]

EDWIN SENIOR et al., Appellants, v. J. C. ANDERSON et al., Respondents.

WATER RIGHTS—PRIOR AND SUBSEQUENT APPROPRIATIONS—EXTENT OF NECESSARY USE—FINDING AGAINST EVIDENCE.—The evidence reviewed and held insufficient to support a finding that the whole of a stream to the extent of the capacity of the ditch of prior appropriators, while there is sufficient to fill it, and all that may flow in it in the irrigating season, is necessary for agricultural and domestic uses on their land, as against subsequent appropriators of the stream. [McFarland, J., dissenting.]

ID.—RIPARIAN RIGHTS—CERTIFICATE OF PURCHASE—PRIOR APPROPRIATION NOT AIDED.—Riparian rights can only entitle the owner to a reasonable use of the water of the stream upon riparian lands; and if a prior appropriation of the stream made for the use of the same lands exceeded in quantity what was required for beneficial uses upon the lands, riparian rights subsequently acquired thereupon by a certificate of purchase by the prior appropriator cannot aid the rights of such appropriator, as against a subsequent appropriator of the waters of the stream.

ID.—RIGHTS OF LOWER SUBSEQUENT APPROPRIATOR.—A lower subsequent appropriator is entitled to have all the stream, except so much as has been antecedently acquired by beneficial use under

a prior appropriation, flow down to his land, for the uses named in his notice of appropriation.

ID.—ADVERSE USE BY PRIOR APPROPRIATOR.—The diversion of water through the ditch of a prior appropriator not necessary for a useful purpose cannot confer a right as against a subsequent appropriator, and after the subsequent appropriation, the application of more water to a beneficial use by the prior appropriator must mark the beginning of adverse use.

ID.—PROPOSED COMPROMISE—AUTHORITY OF PRESIDENT OF WATER COMPANY—EXECUTION OF COMPROMISE BY PLAINTIFFS—RIGHTS OF DEFENDANTS.—A proposition of consolidation and compromise of the water rights of the plaintiffs and of a corporation under which the defendants claim, made by its president without authority or sanction of the corporation, is not binding upon and does not estop the defendants, though acted upon and executed on the part of the plaintiffs. But if it were shown that the president was authorized to make the proposition which was so acted upon, or if the adjustment was ratified by the water company, the defendants might be compelled to perform the agreement.

COSTS—PREVIOUS TRIALS.—The party ultimately prevailing in an action is entitled to recover from the defeated party the costs of previous trials, in so far as they are legitimate and properly taxed.

ID.—MOTION TO TAX COSTS—NOTICE—SPECIFICATION OF OBJECTIONS—AFFIDAVITS—EVIDENCE AT HEARING.—It is sufficient in the notice of a motion to have the costs taxed by the court, under section 1033 of the Code of Civil Procedure, to specify certain items of costs in the cost bill as objected to, and to state that they are not legally chargeable as costs, and were not necessary disbursements in the action. It is not necessary that any affidavits should accompany the notice, but upon the hearing of the motion any competent evidence, oral or written, may be presented to the court.

ID.—UNAUTHORIZED COSTS—REPORTER'S TRANSCRIPT—COPIES OF PAPERS WITHDRAWN.—Items of costs paid without consent of the parties or order of the court, for a transcript of the reporter's notes and for copies of excluded papers withdrawn, are improper, and should be rejected upon taxation of costs.

ID.—COPIES OF PAPERS FROM LAND OFFICE NOT USED—ABSENCE OF EXPLANATION.—An item of cost paid for copies of numerous papers from the commissioner of the general land office, which were not offered in evidence, and the need of which was not explained nor shown to have been reasonably apprehended, should be stricken out.

APPEAL from a judgment of the Superior Court of Ventura County and from orders denying a new trial and denying a motion to retax costs. B. T. Williams, Judge.

The facts are stated in the opinion of the court.

H. L. Poplin, for Appellants.

J. S. Chapman, and E. S. Hall, for Respondents.

THE COURT.—Action to quiet title to a water right. Findings and judgment were for the defendants, and plaintiffs appeal from the judgment and from an order denying a new trial, and also from an order after judgment relating to costs.

A former judgment in this case in favor of the defendants was reversed upon plaintiffs' appeal, and a new trial granted. The second trial was had upon the same pleadings, and the issues are therefore unchanged.

For a statement of the case and the issues involved see the opinion of this court upon the former appeal, reported under the same title, in 115 Cal. 496.

The principal question of fact was then, and is now, the extent or quantity of the Hines' appropriation. Upon the former appeal it was held that the quantity appropriated by Hines was so much of the water of the stream as was reasonably necessary for the use of the Hines tract of land and at the time the action was commenced. The quantity of land then irrigated was not materially different from that now irrigated. The quantity of water then diverted through the Hines ditch and that now diverted, so far as the evidence shows, is the same, namely, seventy-seven and seventy-eight one-hundredths inches, measured under a four-inch pressure. Upon the former appeal, this court concluded, from the evidence, that more water was diverted upon the Hines ranch than was required or used for any useful purpose thereon. The evidence upon the second trial shows that there are now irrigated upon the Hines tract about forty acres in fruit trees, no alfalfa, and ten or twelve acres of wild or uncultivated grass land used for pasturage, and, as before, one hundred and eighty to two hundred acres of nonriparian lands, outside of the Hines tract, upon which citrus fruits are cultivated.

Upon the second trial, there was evidence tending to show that there were other portions of the Hines tract that were capable of irrigation from the Hines ditch, but under the decision upon the former appeal that fact does not affect Senior's appropriation, which is to be determined by the quantity

of water reasonably required for the irrigation of the lands then irrigated upon the Hines tract, omitting, perhaps, the pasture land, which Mr. W. L. Hall testified he did not now irrigate because he did not have sufficient water, and had not for two years. Several witnesses testified that the whole of the water was necessary for use upon the Hines tract, and the court so found, though it was further found that: "While the amount of seventy-seven and seventy-eight one-hundredths inches, measured under a four-inch pressure, would be more than was necessary for the irrigation of the Hines tract, if the same flowed continuously, yet no such quantity of water continues to flow during any considerable portion of the irrigating season, and it is necessary to make use of all the water that would flow in said conduits of the defendants, while the same continues to flow, to keep the lands in such condition as that the quantity of water usually flowing in the stream later in the season would suffice for the proper irrigation thereof, and the said amount flowing in said stream during the irrigation season is, in many years, insufficient in quantity for the proper supply of said lands."

Many witnesses were examined and testified to the effect that the flow of water in the stream greatly diminished during the irrigating season, but no effort seems to have been made to ascertain by measurement the average flow of the water in different months of the season, nor the quantity in fact used upon the Hines ranch, nor upon the outside lands, nor whether the water was used upon the Hines land by continuous flow, or alternately, by time division, with the outside lands. It does appear, however, that the water system of the outside lands had a capacity of thirty inches, and said lands were entitled to five-eighths of the water, and the Hines place to three-eighths; and, in the absence of specific evidence to the contrary, we must assume that the water was in fact used substantially in those proportions. Of course, it is immaterial to the plaintiffs where the water legally appropriated by Hines was used, but the quantity of land irrigated from that source furnishes evidence tending to show whether the quantity of water diverted from the stream through the Hines ditch was more than was reasonably necessary for beneficial uses upon the Hines land, since that was the measure of the extent of his appropriation. Plaintiffs also introduced several

witnesses who had experience in the irrigation of fruit lands in that vicinity who testified to the quantity of land that could, in their judgment, be irrigated with one inch of water flowing perpetually, and these ranged from two acres of fruit land to seven or eight acres to each inch of water, and among the witnesses who so testified were four of the defendants. This wide variance as to the quantity per acre is based partly upon the character of the soil, and partly upon the age of the trees, and the manner of using the water. This evidence tends strongly to sustain the contention of the plaintiff, and supported as it is by the fact that five-eighths of the water is used upon one hundred and eighty acres of other lands, while the remainder sustains the trees growing upon the Hines ranch without injury, so far as disclosed by the evidence, and by the further fact that for two years or more what was supposed to be about one-tenth of the water diverted by both ditches was used upon plaintiffs' land, would appear to greatly preponderate over the general expression of an opinion that the entire flow during the irrigating season was not more than sufficient for the proper irrigation of the Hines land upon which water had been at any time used.

There was some testimony, however, of a different character, and furnishing a different basis of calculation.

W. L. Hall, one of the defendants, and also one of the owners of the Hines ranch and having the charge of it for himself and his co-owner, was asked by his counsel the following question: "When you say it would require forty inches to the acre to irrigate it during the year, do you mean by that that it would take forty inches of say twelve thousand five hundred or thirteen thousand gallons, or whatever an inch of water is, forty times that amount per acre during the year? Is that what you mean when you say forty inches to the acre? A. Forty times thirteen thousand gallons, that is what I mean; and, dividing it up during the season, one-fifth of that would be eight inches to the irrigation; and that amount placed on the ground is what I term forty inches during the season."

Assuming that the witness correctly states the number of gallons required to put one inch of water upon an acre of ground, the number of inches measured under a four-inch

pressure required to put that quantity of water upon an acre of land is not difficult of computation. According to the "Statistician and Economist" for 1899-1900, page 549, one miner's inch (four-inch pressure) will discharge in twenty-four hours, 2,260.8 cubic feet, or 16,956 gallons. Deducting thirty-eight per cent for the difference between the theoretical and the actual flow (6,443 gallons), we have 10,513 gallons actual flow in twenty-four hours, or, for ten days, 105,130 gallons while each irrigation of eight inches on defendants' basis would require eight times 13,000, or 104,000 gallons. If, therefore, we further assume that fifty acres are irrigated on the Hines ranch, fifty inches constant flow would put the required amount of water on each acre every ten days; or a constant flow of seventeen inches would put said required amount of water on said fifty acres every month.

Here is a mathematical demonstration based upon the testimony of defendant Hall, who, with his co-owner of the Hines ranch and of the water right, conveyed that water right to the corporation, and through it to his codefendants; and it may be added that this conclusion is supported more or less directly by the testimony of all the witnesses who base their testimony upon their experience and observation of the quantity of fruit land that may be irrigated per inch of water; and the fact that for seven or eight years before the second trial of this case from one hundred and eighty to two hundred acres of fruit land, outside of the Hines land, had been irrigated almost entirely from the Hines ditch closely approaches a demonstration that the capacity of the Hines ditch, and the water diverted thereby, was largely in excess of the requirements of the Hines ranch.

As to the quantity of water flowing in the stream during the irrigating season, Mr. Hall testified: "About sixty inches on an average flows down that creek to our point of diversion, I would suppose, in the first part of the year, and diminishes rapidly until along in August I have hardly ever found more than thirty inches; last year there was about twenty inches in October. The lowest stage of water I think was sixteen inches. In the first of July last year there was thirty-five or forty inches. That amount, I think, would not be any more than sufficient to irrigate the cultivated lands on the Hines place."

These quantities are estimated by the witness; but, assuming they are correct, and testing the quantity of water required to irrigate the lands that have been irrigated on the Hines place, including the ten or twelve acres of grass land, either by the testimony of the witnesses as to the quantity of water required per acre, or by the computation based upon the theory that eight inches in depth of water is required for each of five irrigations during the season (being equal to forty inches of rainfall), the findings of the court that the whole of the stream, to the extent of the capacity of the ditch, while there is sufficient water to fill it, and all that may thereafter flow during the irrigating season is necessary for agricultural and domestic uses on the Hines land, are not justified by the evidence.

It is contended by respondents that Senior acquired no rights by his notice and the actual diversion of the water in October, 1887; that riparian rights had before that attached to the lands of Mrs. Hines, she having proved up and claimed her final certificate of purchase. There is no merit in this contention. Her riparian rights could only entitle her to a reasonable use of the water upon her riparian lands, but having before she acquired title from the United States appropriated more water than was required for beneficial uses upon said land, she could acquire no right to any additional quantity under the law of riparian rights.

Respondents cite *Smith v Hawkins*, 110 Cal. 122, and *Broder v. Natoma Water etc. Co.*, 101 U. S. 274, to the proposition that where an appropriation of water is made upon the public lands of the United States, when it is perfected, the act of Congress of 1866 operates as a grant of the right. Those cases especially related to the right of way for canals and ditches for the conveyance of water over public lands, and held that as against subsequent purchasers of these lands the act of Congress operated as a grant to the ditch owner, but neither of these cases hold that one can divert water from a stream and, without devoting the water within a reasonable time to a beneficial use, hold it as against an appropriation afterward lawfully made and perfected.

Again, it is contended by respondents that it is not shown by any satisfactory evidence that there was ever any water used on the Senior place except at times when there was a

quantity in the stream in excess of that diverted by the defendants, except the little that rises in the stream below defendants' dam and ditch, and that it does not appear that such right was even interfered with. That Senior was entitled to have all of the stream (except so much as was legally appropriated by Hines) flow down to his land, cannot be questioned; and if Hines, or the defendants, diverted more of the stream than was legally appropriated, it was clearly an interference with plaintiffs' rights; and in the fourth finding it is stated, after finding the posting of the notice and the construction of the ditch by Senior, that he "did divert from the stream at divers times such water as might be flowing therein at the point of said diversion for use upon his land."

By his appropriation Senior was entitled to the quantity of water reasonably necessary for the uses named in his notice, provided that quantity would naturally flow in the stream at the point of his diversion, as against all above him on the same stream, subject to the single exception of rights antecedently acquired. (*Crandall v. Woods*, 8 Cal. 136.)

Respondents contend, however, that the use of water on the Hines place began ten or eleven years before Senior settled upon his land, that Senior settled there in 1886, that his notice of appropriation was posted November 3, 1887, nearly seven years before this suit was begun, and again urge that plaintiffs' right to any of the water actually diverted through the Hines ditch is barred by the statute of limitations. This point was disposed of on the former appeal, where it was said: "The diversion through the Hines ditch of water not necessary for a useful purpose, for any length of time, would not give a right as against the plaintiffs, and, therefore, the application of the water to a beneficial purpose upon other lands by the defendants, or their predecessors in interest, the Ojai Valley Water Company, must mark the beginning of the adverse use"; and that use is clearly shown to have begun within five years before this action was commenced.

That plaintiffs have a useful purpose to which they desire to apply the water is clear. Senior testified that about eighty acres of the one hundred and sixty patented to him is capable

of irrigation, and about twenty-five acres were in actual cultivation at the commencement of this suit.

In April, 1892, W. L. Hall, then president of the Ojai Valley Water Company, and one of the owners of the Hines place, wrote a letter to Mr. Senior in which was outlined a scheme for the consolidation of the water right of the plaintiffs with that of the corporation, by which plaintiffs were to have one-tenth of the whole of the water diverted by both ditches. A sufficiently full statement of the proposition and what was done thereunder appears in the opinion upon the former appeal (115 California) at pages 506, 507. This scheme was fully executed so far as the plaintiffs were concerned. Hall was permitted to unite the two ditches, and he also inserted a pipe in the flume through which was conveyed to the plaintiffs approximately one-tenth of the whole flow of the water, and that was continued for two years. Plaintiffs executed conveyances of the water right and of the rights of way, and offered to deliver them, and one or more of the conveyances required to be given to the plaintiffs were prepared by Hall. The corporation, however, never took formal action upon the proposition, which was made by Hall, personally, as an adjustment which he was willing to make and would advise the corporation to ratify; but he testified that he had conferred with the stockholders and members of the board, and they declined or refused to approve the scheme. No change was made, however, in the use of the water until after the conveyance was made by the corporation to the individual stockholders who constitute the San Antonio Water Company, and appellants contend, in substance, that the defendants having received a conveyance of the property and water right from the corporation while the waters were so united and used, the defendants are estopped to deny the validity of this adjustment of the controversy and of plaintiffs' right to said one-tenth of the united flow of both ditches in the manner proposed and executed by Hall. We do not think, however, that because the defendants bought the property and rights of the corporation, whether they be regarded as a voluntary unincorporated association, or as copartners, or as individuals, while Senior's pipe was still attached to defendants' flume, that they are bound by a transaction which was not obligatory upon their grantor. If it were shown that Hall was authorized by the

corporation to make such adjustment of the conflicting claims of the corporation and the plaintiffs, or that what he did had been subsequently ratified by the corporation or the defendants, there would be no difficulty in compelling a performance of the agreement which would have happily, and perhaps justly, ended this unfortunate controversy.

There is also an appeal from an order denying plaintiffs' motion to retax costs.

As to the liability of the party ultimately defeated for the costs of previous trials, so far as the same are legitimate and properly taxed, it may be said, for the guidance of the court upon a new trial being had, that the party defeated is liable. Upon this point see *Stoddard v. Treadwell*, 29 Cal. 281, and the cases there cited. In *Shreve v. Cheesman*, 69 Fed. Rep. 789, it was said that the Colorado statute which provides that "the prevailing party shall recover his costs to be taxed" authorizes him to recover all his costs in the action, including those of a prior mistrial, as well as those of the last trial. (Citing numerous cases from other states.)

The bill of exceptions, taken upon the hearing of the motion to retax the costs, contains the notice of said motion which sets out the various items objected to, amounting in all to \$397.75, including \$79.65, the costs of the former trial. Upon the hearing the court struck out certain items amounting to \$30.10, and taxed the remainder at \$395.65. The notice of appeal specifies the items as to which the appeal is taken.

The first item, costs of former trial, \$79, has been disposed of.

The notice of motion to retax the costs was not accompanied by any affidavit specifying the grounds of the objection to the items mentioned therein, but it was stated that the items mentioned were not legally chargeable as costs against the plaintiffs, and that they were not necessary disbursements in the action; and that "the motion would be heard on the papers on file, and any other testimony that may be produced on the hearing of the motion."

Upon the hearing, Mr. Poplin, plaintiffs' attorney, was sworn and offered to testify concerning certain items, and defendants objected that no affidavits in support of or specify-

ing the facts upon which the objections were based, accompanied the notice, and that the only evidence admissible under the notice was the papers in the case. The objection was taken under advisement, and the testimony admitted subject to said objections, to be determined upon the decision of the motion. The question does not appear to have been passed upon. The court denied the motion, and upon its own motion struck out certain items hereinbefore stated.

Section 1033 of the Code of Civil Procedure, which provides for motions to have the costs taxed by the court, does not specify what the notice must contain, nor upon what kind of evidence it shall be heard. The notice of the motion was certainly as specific as the affidavit to the cost bill, and was sufficient; and any evidence, oral or written, in its nature competent to prove or disprove a material fact in a court of justice we think is competent upon the hearing of such motion.

The following items stated in the notice of appeal from the order should have been rejected:

1. "Reporter, A. Pratt, for transcript, \$223.20." As to this item, the uncontradicted evidence given by Mr. Poplin shows that counsel for defendants requested him to consent to an order to have the reporter write up his notes, each party to pay one-half of the cost of the same, and this request was refused, and the matter being presented to the court, the court declined to make such order unless plaintiffs would consent, and plaintiffs refused to give such consent, and that the notes were transcribed without their knowledge or consent. Under these facts the said item was not a proper charge in the cost bill, and should have been stricken out. Besides, the item was too indefinite, and did not show upon its face that it was a proper charge either as to subject or amount.

2. "A. R. Crawford, copying papers withdrawn, \$19.25." These copies were not made by any consent or order of the plaintiffs or their attorney, or of the court. These papers were offered by defendants to be read in evidence, but were excluded under objection of plaintiffs. The ground of objection under which they were excluded does not appear. This item being objected to, and it not appearing upon its face to be a proper charge, the burden was upon the defend-

ant to show facts sustaining it. (*Miller v. Highland Ditch Co.*, 91 Cal. 103.) Besides, it appears that the copies were of records of Ventura county, and under rule 23 of the superior court of that county the cost of copies of such records are not allowed as costs, unless they have been ordered by the court or judge.

3. "Paid commissioner of general land office for copies of papers, \$14.95." This item was the cost of copies of all the papers on file in said office relative to the homestead entry of Alice Hines, "aggregating thirty-three pages, and seventeen instruments not introduced in evidence." No explanation is given tending to show that in any contingency, reasonably to be apprehended, they would be needed. This item should also have been stricken out.

The other items appear to have been for proper or necessary disbursements, and, in the absence of some evidence tending to show that they are false, excessive, or erroneous, should be allowed.

It is ordered that the judgment and the order denying defendants' motion for a new trial be reversed, and that the court below be directed to strike from the defendants' cost bill the three items above specified amounting to \$257.40.

McFARLAND, J., dissenting.—I dissent. This case involves certain water rights, and the appeal is by plaintiffs from a judgment in favor of defendants, from an order denying their motion for a new trial, and from an order denying the plaintiffs' motion to strike out defendants' cost bill, and refusing to strike out certain items in said bill.

There was an appeal to this court from a former judgment in favor of defendants, wherein the judgment was reversed and a new trial ordered. The decision on that appeal is to be found in 115 California Reports, commencing at page 496, where the general features of the case are stated. The defendants claim the water rights which they assert here through J. D. Hines and his successors in interest; and it is beyond all question that defendants and their predecessors have since the year 1883, and under claim of right, continuously diverted the waters of San Antonio creek to the extent of seventy-eight and seventy-seven one-hundredths inches, measured under a four-inch pressure, by means of a certain

flume and ditch, when that amount was flowing therein, and when less than that amount was so flowing in the creek, they have thus diverted the whole of said waters; and the court correctly and upon sufficient testimony so found. The only important question on both trials was whether or not during two or three years of the first appropriation and use by Hines the water was used for a beneficial purpose. On the former appeal this court held that while it was clear that defendants and their predecessors had actually and continuously diverted the said amount of waters since 1883, the evidence was not sufficient to show that Hines had diverted the same for a beneficial purpose; and for that reason the judgment was reversed. At the second trial the superior court reached the same conclusions at which it arrived at the first trial, although the findings are in many respects much fuller than they were before. The evidence at the last trial is certainly to some considerable extent different from that at the first trial, and more favorable to the defendants. The reversal on the former appeal seems to have been based to a very great extent upon an expression in the testimony of the witness E. S. Hall, that Hines irrigated the hillsides of his land for the purpose "of holding the water." At the last trial, however, the testimony of Hall was a great deal fuller than at the former trial; and he explained that Hines, in addition to irrigating certain small orchards and alfalfa, irrigated the hillsides for the purpose of raising grass as feed for a large number of cattle which Hines then had. This certainly was a beneficial purpose within the meaning of the law on that subject. Of course, everyone who appropriates and diverts water does it, in a certain sense, for the purpose of holding it; and taking Hall's testimony in the most adverse sense to defendants it can be construed as nothing more than meaning that Hines perhaps intended that when his orchards should become larger and require more water he would apply part of the water employed for the irrigation of the grass to the irrigation of his orchards and other crops which he might subsequently raise on the lands, and as was said by Justice Field in *Atchison v. Peterson*, 20 Wall. 514: "A different use of water subsequently does not affect the right." This

principle also applies to the subsequent use by defendants of the water for certain other purposes.

As to the question whether or not the water diverted by Hines was more than was reasonably required to irrigate his land the evidence was conflicting, and there was certainly sufficient evidence to warrant the finding of the court on that subject. It is to be noticed that the diversion was made by an open ditch and flume, a plan very different from the more modern system of pipes and reservoir. The court further found that while the creek at times furnished water enough to fill the ditch to the extent of seventy-eight and seventy-seven one-hundredths inches, yet after the commencement of the irrigation season the water in the creek rapidly diminished—in some seasons to ten, and even to five inches—and that the use of the full capacity of the ditch during the early part of the season in fully saturating the land was necessary to provide against the very small amount of water that could be obtained later. Looking, therefore, over the whole of the evidence in the case, I do not feel warranted in saying that it was insufficient to support the finding that the amount of water stated therein was diverted by the defendants and their predecessors for a lawful and beneficial purpose.

I do not think that property in ditches and water rights which have been established and held for many years should be jeopardized by attacks of as light a character as those relied on in the case at bar; and when such attacks have been held by the trial court to be unwarranted I do not think that its finding should be disturbed, and long established property rights upset, upon such showing as is made here by appellant. In my opinion the judgment should be affirmed.

Rehearing denied.

McFarland, J., dissented from the order denying a rehearing.

[S. F. No. 1331. In Bank.—October 25, 1900.]

JOHN D. WORKS, Petitioner, v. SUPERIOR COURT OF
THE COUNTY OF SAN DIEGO, Respondent.

CONTEMPT—BIAS AND PREJUDICE OF JUDGE—MOTION FOR CHANGE OF JUDGE.—Since the amendment of 1897 to section 170 of the Code of Civil Procedure, making the bias and prejudice of the judge a ground of objection to his competency to try a cause, a party making such an objection may file affidavits in support of his motion for a change of trial judges without being guilty of a contempt, unless he purposely includes matters wholly irrelevant and immaterial, and which are justly offensive to the judge who must pass upon the motion.

ID.—HOSTILITY OF JUDGE TO ATTORNEY.—Since the passage of such amendment, an attorney at law who appears for a party objecting to a trial judge on the ground of his alleged bias and prejudice is not guilty of contempt in causing to be inserted in the moving affidavits the fact that he, as the attorney for the moving party in another case, had filed a brief in the supreme court which the trial judge had regarded as a reflection upon himself, and that the judge had since refused to speak to the attorney. Such fact, though by no means conclusive, is relevant and material on the question of bias and prejudice.

APPLICATION for a writ of *certiorari* to review an order of the Superior Court of San Diego County convicting the petitioner of contempt. E. S. Torrance and J. W. Hughes, Judges.

The facts are stated in the opinion of the court.

Bradner W. Lee, and Ray P. Safford, for Petitioner.

A. H. Sweet, for Respondent.

BEATTY, C. J.—This is a proceeding by *certiorari* to review an order convicting the petitioner of a contempt of court. The return to the writ consists exclusively of a certified copy of the order adjudicating the petitioner guilty, with the recitals upon which it is based. It appears therefrom that the petitioner, as attorney for the San Diego Water Company in an action pending in the superior court, presented a motion that a judge from some other county be called in to try the cause, basing his motion partly upon what he

claimed to be a legal disqualification of the San Diego judges, and partly upon the ground that his client could not have a fair trial before said judges, or either of them, by reason of their prejudice and bias. That in support of his motion he read to the court an affidavit which he had prepared and caused to be verified by an officer of the corporation, containing several statements of fact made positively and not on information and belief, which facts petitioner knew at the time he prepared and read the affidavit were not within the personal knowledge of the affiant. With respect to these statements, however, it is not found that they were in any respect untrue, and since they related to proceedings in other causes in the superior court of San Diego county to which the San Diego Water Company was a party, and to matters within the personal knowledge of the judges of that court (both of whom participated in making the order here under review), it must be concluded that the only objection to the affidavit on this score was that the statements in question, though true, should not have been made positively, but only upon information and belief.

Whether that fault in the affidavit would amount to a contempt of court need not be considered, because the further recitals preceding the order, and the order itself, show very clearly that it was for something entirely different and distinct from those statements that petitioner was found guilty.

To make this evident we quote the recitals which follow and the order based thereon:

"And, whereas, it further appears from the affidavit of J. M. Howells, presented and read as aforesaid to the court by the said John D. Works, that in two causes heretofore pending in this court, to each of which the said San Diego Water Company was a party, viz., *Albert Meyer v. The City of San Diego et al.*, and *The San Diego Water Company v. The City of San Diego et al.*, the said San Diego Water Company moved the said judge of Department One of this court for a change of the place of trial of said causes, on the ground that said judge was an interested party and therefore disqualified, which motion was overruled by said judge of Department One of this court. That said San Diego Water Company appealed from the said order denying its motion

for a change of place of trial of said causes, and in his brief, in support of its appeal, claimed that said judge was legally disqualified to try said causes, and that the circumstances were such that the said judge should, on his own motion, have called in another judge without an affidavit having been filed. That said judge, as affiant is informed and believes, claimed that said brief was a reflection upon him and complained to the supreme court of the same; that the attorneys for the city of San Diego and the Southern California Mountain Water Company (which was also a party to one of said causes) moved said supreme court to strike said brief from the files, on the ground that it was scandalous and impertinent, and that the said supreme court struck said brief from the files; and that, as affiant is informed and believes, said judge of Department One of this court claimed that he had been unjustly treated in the filing of said brief and took personal offense thereat to such an extent that he has not since spoken to the senior attorney for said San Diego Water Company;

“And, whereas, the said John D. Works was the senior attorney for said San Diego Water Company, referred to in said affidavit of J. M. Howells, and was one of the attorneys who prepared and filed said brief in the supreme court of this state;

“And, whereas, said brief, filed in said supreme court as aforesaid, did in fact contain language which was scandalous and impertinent, reflecting upon the integrity and good faith of the said judge of Department One of this court in denying said motion for change of place of trial of said causes;

“And, whereas, the hearing of the present motion was continued by the court until to-day at 10 o'clock A. M., in order to hear the argument of counsel thereon, and the said John D. Works appeared on this day and orally argued said motion before the court, and at the close of his argument was given an opportunity by the court to explain his purpose and reasons for inserting in said affidavit of J. M. Howells the matters hereinbefore set forth and presenting the same for the consideration of the court, and the said John D. Works having been heard by the court in explanation thereof;

“And, whereas, the court finds that the said John D. Works, by incorporating in said affidavit of said J. M. How-

ells the statement therein contained last above recited, and presenting and reading the same to the court, intended thereby to show his disrespect to the court, and especially to the judge of Department One of this court, and to improperly influence the decision to be made by the court upon the motion presented by him as aforesaid; and, whereas, said statement in said affidavit of J. M. Howells last above referred to was irrelevant and immaterial to any issue involved in the hearing of said motion:

"It is therefore considered, ordered, and adjudged by the court that the said John D. Works is guilty of a contempt of the authority of this court, and as punishment therefor it is considered, ordered, and adjudged that he pay a fine of two hundred and fifty dollars, and that execution issue therefor."

According to the plain terms of this order the petitioner was convicted of a contempt of court because, and only because, he incorporated in the affidavit of Howells the statements concerning the brief filed by him in support of the appeal in another case to which the San Diego Water Company was a party. And the reference to that brief was held to be a contempt upon the ground that it was irrelevant and immaterial to any issue in the case.

The question to be decided, therefore, in passing upon the validity of the order is whether the matter objected to was irrelevant and immaterial to the issue. For it cannot be doubted that since the amendment of section 170 of the Code of Civil Procedure, adopted in 1897 (Stats. 1897, p. 287), any party to an action may object to a judge upon the ground that he is so prejudiced and biased as to be incapable of trying the cause fairly and impartially, and that he may support his objection by affidavit showing such bias. Having this clear legal right, neither the party nor his attorney can be held guilty of a contempt of court in making the objection or in supporting it by proof unless he goes out of his way to introduce something purposely and gratuitously offensive. This proposition is in effect conceded by counsel for respondent in his brief, where he says: "If these matters stated in the affidavit were pertinent to the issue to be determined by the court, and, as claimed by the petitioner in his petition for the writ of review issued in this proceed-

ing, 'were presented to said court in a respectful and proper way, and without intending a reflection upon or give offense to the judges of said court, or either of them, and with no other purpose or object than to secure to his said client a legal right to which he believed it to be entitled,' then it must be conceded that there could have been no contempt of court. But the trial court determined that these matters were not material to the issue; and such determination is supported by reason and authority."

There is no finding or recital or charge that the affidavit was presented otherwise than respectfully and properly, or with any other object than to secure the legal rights of petitioner's client, or with any intention to reflect upon or give offense to the judges of said court, or either of them, except in so far as an improper motive or intention can be inferred from the supposed irrelevancy and immateriality of the statements objected to. And so, we repeat, it is clear that the contempt charged and found consisted wholly in the insertion in the affidavit of matter irrelevant and immaterial to the issue.

This being, then, the sole question to be decided, we are constrained to say that our view of the case differs from that of the superior court. The fact that the petitioner, as attorney for the same corporation in another case, had filed a brief in this court which one of the judges regarded as a reflection upon himself, and that he had since refused to speak to petitioner, though by no means conclusive on the question of bias, was in our opinion relevant and deserving of consideration in connection with other facts. And it contained nothing reflecting upon the judge in any manner other than he is necessarily reflected upon by the mere allegation of prejudice and bias. That such an objection to the trial of a cause by a particular judge is in some sense a reflection upon him is undeniable, but if a party chooses to avail himself of his statutory right, this consequence cannot be avoided; and so long as the affidavits in support of the motion contain nothing clearly irrelevant and immaterial, they cannot be made the basis of a proceeding for contempt merely because they reflect upon the fairness of the judge. Their whole object is to prove his prejudice, and it is the express design of

the statute that the moving party should be allowed to sustain his allegation by evidence of any material fact.

In *Ex parte Jones*, 103 Cal. 397, the prisoner had been committed for a contempt of court in moving, before the amendment of 1897, for a change of the place of trial upon the ground of prejudice and bias of the trial judge, and reading an affidavit in support of his motion. In that case we said: "If the affidavit had been material and revelant, and pertinent to any issue before the court, a different question might be presented. If bias, prejudice, or partiality on the part of a judge was a ground for a change of venue, a party seeking such change upon such ground would have the right to state in an affidavit the facts upon which he based his charges of such bias."

Following this decision comes the amendment to the law making the bias and prejudice of the judge a ground of objection to his competency to try a case, and it follows that the party objecting must be allowed to file his affidavits in support of his motion without incurring the penalties of a contempt, unless he purposely includes matters wholly irrelevant and immaterial and which are justly offensive to the judge who must pass upon the motion. If, as in this case, the facts alleged are relevant to the issue, there can be no contempt.

The order under review is void, and is hereby set aside.

Van Dyke, J., Temple, J., and McFarland, J., concurred.

[Sac. No. 640. Department One.—October 26, 1900.]

T. A. CROW, Respondent, v. SAN JOAQUIN AND KINGS RIVER CANAL AND IRRIGATION COMPANY, Appellant.

DISTRIBUTION OF WATER—PUBLIC USE—TENDER OF RATES—CONDITION OF SUPPLY—DUTY OF WATER COMPANY.—Under the provisions of section 1 of article XIV of the constitution, and of the act of March 12, 1885, to enforce the same, the sale, rental, or distribution of water is declared to be a "public use," and it is made the duty of a water company supplying water for distribution

to furnish water upon tender of the established rates, and no other duty than such tender can be lawfully prescribed or imposed by such company as a condition for supplying water as required by law.

ID.—REFUSAL TO SUPPLY WATER FOR IRRIGATION—NONPAYMENT OF PREVIOUS RATES—RULE SUBSCRIBED BY DISTRIBUTE.—The refusal of an irrigation company to supply water to a distributee for irrigation of his land, upon tender of the established rates therefor, cannot be justified on the ground that the rates for previous years are unpaid, and that by a regulation of the company subscribed by the distributee it was made a condition precedent to the right to receive water that all dues and claims for previous supplies should first be paid. [Beatty, C. J., and McFarland, J., dissenting.]

ID.—CONSIDERATION OF CONTRACT—DUTY OF COMPANY.—The subscription to such rule, considered as a contract for all future time, is without consideration, it being the duty of the irrigation company to furnish water to a distributee at the established rates, whether the distributee agreed to the regulations or not [Beatty, C. J., and McFarland, J., dissenting.]

ID.—DAMAGES FOR REFUSAL—PROXIMATE DETRIMENT—SPECULATIVE LOSS OF PROFITS NOT ALLOWABLE.—The damage arising from a breach of contract, or in tort, is the detriment proximately caused thereby; and for the refusal of an irrigation company to supply water at its established rates, a loss of profits which the plaintiff might have realized from an unplanted crop, which he would have planted if he had had the water, is too remote and speculative to be allowed as damages.

ID.—MEASURE OF DAMAGES—DIMINUTION IN RENTAL VALUE—DEDUCTION OF PRICE OF WATER.—The proper measure of damages for such refusal is the difference between the rental value of plaintiff's land with the water and its rental value without it, deducting from the difference the lawful price of the water.

APPEAL from a judgment of the Superior Court of Stanislaus County and from an order denying a new trial. William O. Minor, Judge.

The facts are stated in the opinion of the court.

E. B. & George H. Mastick, for Appellant.

A regulation by a company supplying water, that no person shall be entitled to be supplied until he has paid all dues for previous supplies, is reasonable and valid, and binding on all customers having notice of it. (*Sheward v. Citizens' Water Co.*, 90 Cal. 635, 642; *Girard Life Ins. Co. v. Philadelphia*,

88 Pa. St. 393; *People v. Manhattan Gas Light Co.*, 45 Barb. 136; *Tacoma Hotel Co. v. Tacoma Light etc. Co.*, 3 Wash. 316¹; *Appeal of Brumm* (Pa.), 12 Atl. Rep. 855; *McDaniel v. Springfield Waterworks Co.*, 48 Mo. App. 273, 280; *Shiras v. Ewing*, 48 Kan. 170.) The contract was binding and was supported by the consideration of the water supplied under the rule assented to by plaintiff, at his request. (Civ. Code, sec. 1584; *Mathewson v. Fitch*, 22 Cal. 86; *Nevada Bank v. Steinmitz*, 64 Cal. 301.) The plaintiff could waive the advantage of the law for his benefit. (Civ. Code, sec. 3513.) The discharge in insolvency could not affect the contract. The debt was not paid by the discharge. (*Smith v. Richmond*, 19 Cal. 476, 483; *Chabot v. Tucker*, 39 Cal. 434, 439; *Whitmore v. San Francisco Sav. Union*, 50 Cal. 145.) The court erred on the question of damages. The proper measure of damages was the difference in the rental value, less the price of the water. Uncertain and speculative profits, which might or might not have been realized, are not recoverable, either for a tort or breach of contract. (*Muldrow v. Norris*, 2 Cal. 74, 78²; *Giaccomini v. Bulkeley*, 51 Cal. 260; *Friend & Terry Lumber Co. v. Miller*, 67 Cal. 464; *Wallace v. Ah Sam*, 71 Cal. 197, 202³; *Chicago v. Huenerbein*, 85 Ill. 594⁴; *Pollitt v. Long*, 58 Barb. 20, 35; *Western Gravel Road Co. v. Cox*, 39 Ind. 260; *Hair v. Barnes*, 26 Ill. App. 580; *Jones v. Nathrop*, 7 Colo. 1; *Redd v. Augusta*, 25 Ga. 386; *Rhodes v. Baird*, 16 Ohio St. 573.)

Maddux & Stonesifer, and L. W. Fulkerth, for Respondent.

The defendant assumed a public duty under the constitution and law of the state, and was bound to furnish the water upon tender of the established rates therefor. (Const., art. XIV, sec. 1; Stats. 1885, p. 98; *Price v. Riverside Land etc. Co.*, 56 Cal. 431; *People v. Stephens*, 62 Cal. 209; *McCrary v. Beaudry*, 67 Cal. 120; *Merrill v. Southside Irr. Co.*, 112 Cal. 435, 436; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Crumley v. Watauga Water Co.*, 99 Tenn. 420.) And this is so even though the consumer may be in arrears in his water bills, notwithstanding there may be a rule of

¹ 28 Am. St. Rep. 35.

² 56 Am. Dec. 313.

³ 60 Am. Rep. 534.

⁴ 28 Am. Rep. 626.

the company that it may shut off the water if such back bills are unpaid, and especially is this the true rule where credit has been given the water consumer on these back bills. (*Crumley v. Watauga Water Co.*, *supra*; *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556; *Wood v. Auburn*, 87 Me. 287; *American Waterworks Co. v. State*, 46 Neb. 194.⁵) Respondent is entitled to recover the value of the crop which might have been raised on his land had appellant furnished him the water to irrigate it when he demanded it. (*Rice v. Whitmore*, 74 Cal. 619⁶; *Hale v. Trout*, 35 Cal. 242-46; *Lambert v. Haskell*, 80 Cal. 618; *Hawthorne v. Siegel*, 88 Cal. 167⁷; *Bryson v. McCone*, 121 Cal. 159; *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205⁸; *Hitchcock v. Supreme Tent etc.*, 100 Mich. 40⁹; Civ. Code, sec. 3333.)

VAN DYKE, J.—The appeal is from a judgment in favor of the plaintiff and from an order denying defendant's motion for a new trial. The action was to recover damages for the refusal on the part of the defendant to furnish water to the plaintiff for the irrigation season of 1896 on tender by him of the regular rates therefor.

1. Defendant does not deny the refusal as alleged, but seeks to justify its action on the ground that the plaintiff was indebted to it for water furnished to him in the years 1893 and 1894; that by the regulations of the company, to which the plaintiff had subscribed, it was made a condition precedent to the right to receive water that all dues and claims for previous supplies should first be paid.

To meet this alleged justification on the part of the defendant the plaintiff ordered in evidence a certificate of discharge in insolvency, dated September 5, 1896, five days subsequent to the date of the demand by him for water and refusal on the part of the defendant to supply the same. It is contended on the part of the appellant that the certificate of discharge was invalid for the reason that it was not under seal, and also that it was subsequent to the commission of

⁵ 50 Am. St. Rep. 610.

⁶ 5 Am. St. Rep. 479.

⁷ 22 Am. St. Rep. 291.

⁸ 54 Am. Rep. 676.

⁹ 43 Am. St. Rep. 423.

the wrong, if any, on the part of the defendant in refusing to supply the water demanded. Under the view we take of the case, however, it is unnecessary to consider this so-called discharge in insolvency. The alleged contract between the parties relied upon by appellant consisted simply of the applications for water, made by the plaintiff in 1893 and 1894, to which were attached the regulations of the company, including, among other things, the provision that "no land will be supplied with water unless all dues and claims for previous supply on that land shall have been paid." If this could be considered as a contract binding upon the user of water for all future time, it would be without consideration; for it was the duty of the defendant company to furnish the plaintiff with water whether he agreed to the regulations or not.

The use of water, in this state, appropriated "for sale, rental, or distribution" is a public use (Const., art. XIV, sec. 1), and by the act of March 12, 1885 (Stats. 1885, p. 95), enacted to carry out this provision of the constitution, it is made the duty of the company administering such use, "upon demand therefor and tender in money of the established water rates to sell, rent, or distribute such water" to the inhabitants of the county "at the established rates regulated and fixed therefor, as in this act provided, whether so fixed by the board of supervisors or otherwise," etc. And it is further provided in said act that for failure to do so an action may be maintained for "damages to the extent of the actual injury sustained." By section 552 of the Civil Code the same duties are also imposed upon such corporations in favor of those to whom water had been previously sold by such company. (*Price v. Riverside Land etc. Co.*, 56 Cal. 431; *McCrary v. Beaudry*, 67 Cal. 120; *Merrill v. South Side Irri. Co.*, 112 Cal. 435, 436.) It was therefore the duty of the defendant, under the law as established in this state, to furnish the plaintiff water upon a tender of the established rates; and this rule precludes the idea that any other duties can be prescribed or imposed, except the tender of the rate, as a condition for supplying water, as required by law.

2. The only evidence offered on the part of the plaintiff as to damages consisted of testimony that had he obtained

the water he would have planted a crop of alfalfa from which he would have realized certain profits, but owing to his failure to get the water he did not plant it. This evidence was admitted over the objections and exceptions of the defendant; and the court instructed the jury that the plaintiff was entitled to recover as damages the profits he would have realized from "the crops of alfalfa that he would have raised on the said land had water been furnished by defendant as demanded by the plaintiff, less the cost of planting, cutting and caring of such crops, and less what said land actually produced and netted to plaintiff in the years 1896 and 1897." Herein we think the court was clearly in error.

The measure of damages arising from a breach of contract, or in tort, is the detriment proximately caused thereby. (Civ. Code, secs. 3330, 3333.) The rule embodied in the instruction of the court and under which the testimony on behalf of the plaintiff was admitted is too remote and speculative. The proper measure of damages in a case like this is the difference between the rental value of the land with water and its rental value without it, and the lawful price of the water should also be taken into consideration and deducted. If the land had been actually taken from the plaintiff by the defendant during the period in question, the company would have been liable only for its rental value during the time plaintiff was deprived of it. Conjecture as to profits of the kind sought here cannot be recovered as damages in such cases; they must be damages capable of ascertainment by proof to a reasonable certainty; uncertain and speculative profits, which might or might not have been realized, are not recoverable in such action. (*Muldrow v. Norris*, 2 Cal. 74-78¹⁰; *Giaccomini v. Bulkley*, 51 Cal. 260; *Chicago v. Huenerbein*, 85 Ill. 594¹¹; *Pollitt v. Long*, 58 Barb. 20, 35.) In *Chicago v. Huenerbein*, *supra*, the action was for damages in flowing water upon plaintiff's land, thereby preventing him from cultivating it. The trial court permitted the plaintiff to prove that if the land had been planted with potatoes the ground would have yielded two hundred bushels to the acre; that they would have sold at about an average of

¹⁰ 56 Am. Dec. 313.

¹¹ 28 Am. Rep. 626.

seventy cents per bushel when matured. On appeal the court say: "The rule for the assessment of damages was wrong. In cases of this character the true measure is the fair rental value of the ground which was overflowed, and not the possible or even the probable profits that might have been made had the land not been overflowed. Such damages are too remote and speculative, depending upon too large a variety of contingencies which might never have happened." In this case one of plaintiff's witnesses, and a farmer of experience, testified that even good farmers in sowing alfalfa "frequently failed to make a stand," and that that had happened to himself. The result of the crop would largely depend upon the amount and character of the care it should receive, the condition of the weather, and a variety of other matters entirely uncertain and contingent. In this case it appears that the plaintiff applied for water on August 31, 1896, and was refused. Afterward, having settled his back indebtedness, he obtained water in the spring of 1897, having been deprived of the water only about eight months. He testified that he had the land for six years, and that although he had had water all the time for five of those years he had never made anything; in fact, after farming it for four years he became insolvent; yet the jury, under the instructions and testimony referred to, estimated that if he had got the water on this particular occasion eight months sooner than he did, he would have made a clear profit of one thousand and ninety-one dollars, which was the amount of their verdict.

For the foregoing error on the question of damages the judgment and order denying a new trial are reversed and a new trial ordered.

Garoutte, J., and Harrison, J., concurred.

A rehearing was denied by the court in Bank November 23, 1900. Beatty, C. J., and McFarland, J., dissented from the order denying a rehearing, and Chief Justice Beatty delivered the following opinion, which was filed November 24, 1900:

BEATTY, C. J.—I dissent from the order denying a rehearing and from the conclusion of the department upon the point decided. The defendant did contract, and upon a val-

uable consideration, to waive his statutory right to receive water upon payment or tender of the established rate. He agreed that if the defendant would furnish him with water in 1894, without payment in advance, he would make payment before demanding water in 1895. The defendant furnished the water in 1894 without the payment in advance, which it had the right to demand. The credit given was a good and valuable consideration for the plaintiff's agreement to waive his statutory or constitutional right, and the only question—so far as this part of the case is concerned—is whether it is competent for a party to agree in advance to waive a statutory right. In my opinion, the right in question here is one which may be waived by contract, and I think it bad policy to deny to parties in the situation of this plaintiff and defendant the right to make a contract which in many cases would be greatly to their mutual advantage, and as to the propriety and expediency of which they are the best, and ought to be the sole, judges.

McFarland, J., also dissented.

[Sac. No. 646. Department One.—October 26, 1900.]

WALTER W. BYRNE et al., Appellants, v. B. McGRATH,
Respondent.

ESTATES OF DECEASED PERSONS—TRUST FUND—IDENTITY—PRESENTATION OF CLAIM.—Where a trust fund held by a deceased person is susceptible of identification, the trust may be enforced without the presentation of a claim against the estate; and it is only where the trust fund cannot be identified that the presentation of a claim against the estate, within the time limited by law, is essential.

ID.—TRUST FUND CREATED BY WILL—INVESTMENT IN DRUG BUSINESS—IDENTIFICATION OF FUND—FINDING AGAINST EVIDENCE.—In an action to enforce a trust against the estate of a deceased husband, created under the will of his deceased wife, for the support, maintenance, and education of their children, evidence showing that he received two thousand five hundred dollars from her estate as trustee thereof, and added thereto five hundred dollars intended as an

advance for the children, and invested the whole in a drug store and business, which he conducted until his death, sufficiently establishes the identification of the trust fund, and a finding that neither the property purchased nor the proceeds thereof were traced and identified as constituting the trust fund is against the evidence.

ID.—EFFECT OF ADVANCE MADE BY HUSBAND—INTENTION—PROPORTIONATE INTEREST—MINGLING OF FUNDS—ACCESSION TO TRUST FUND.—

The effect of the money advanced by the husband, though not passed upon in the findings, could not, in any aspect, materially affect the identity of the trust fund. The evidence was sufficient to support a finding that it was intended as an advance to the children; but if it were otherwise, he could have only a proportionate interest in the fund, and if he mingled his money with the trust fund, it would become part of it by accession.

ID.—ACCOUNTING AT DEATH OF HUSBAND—BALANCE OF FUND—REPAYMENT OF ADVANCE.—

The advance by the husband cannot be material, where the evidence shows that upon an accounting of the business at his death the balance would be largely against him, after deducting and repaying all money advanced by him.

ID.—IDENTITY OF DRUG STORE AND BUSINESS—CHANGE OF MATERIALS—PERMANENT ENTITY.—

The question of identity of the trust fund invested in the drug store does not relate to the specific items of stock, fixtures, etc., constituting the store at the time of the purchase, but relates to the drug store or business regarded collectively as a thing or entity, distinct from the mutable and transitory materials belonging to the concern, which collective thing constituted the trust fund and remained the same, though the materials, like the particles of water in a river, were continually changing.

ID.—RIGHTS OF BENEFICIARIES AGAINST ESTATE—CREDITORS OF DECEASED.—

The beneficiaries of a trust fund held by a deceased person, which is satisfactorily identified, may enforce it against the administrator; and the creditors of the deceased who merely loaned him their money on the fictitious credit of the trust fund held by the deceased cannot successfully resist an action to enforce the trust.

ID.—LIMITED TRUST NOT TERMINATED—APPOINTMENT OF TRUSTEE.—

The limited trust created by the will of the deceased wife for the maintenance, support, and education of the children did not terminate upon the death of the husband; and in enforcing the trust against the estate upon their suits, another trustee will be appointed to take charge of the trust fund, as successor to the deceased.

ID.—TRUST LIMITED TO LIVES—REMAINDER UNDISPOSED OF—SUCCESSION.—

The trust so created under the will of the deceased wife cannot extend beyond the lives of the children; and the remainder, not being disposed of by her will, passed by intestate succession, one-third to the father and two-thirds to the children.

APPEAL from a judgment of the Superior Court of Nevada County and from an order denying a new trial. F. T. Nilon, Judge.

The facts are stated in the opinion of the court.

Alfred D. Mason, for Appellants.

A. J. Ridge, for Respondent.

THE COURT.—Appeal from judgment for defendant, and from order denying plaintiffs' motion for a new trial. The appeal from the judgment was taken more than six months after the entry of judgment, and must be dismissed. The cause was before this court on a former appeal (*Byrne v. Byrne*, 113 Cal. 294), and is thus stated in the report of the case:

"Plaintiffs, who are the children of Michael Byrne, Jr., deceased, commenced this action against the administratrix of his estate and the creditors thereof, seeking a decree that certain property which had come into the possession of the administratrix as the property of the estate was in fact held by their father as trustee in trust for them. . . . The estate of Michael Byrne, Jr., is admittedly insolvent, and the defendants in interest are creditors of his estate with allowed claims. Plaintiffs, having failed to present their claims against the estate within the time contemplated by law, are here seeking to follow, and claim to have followed, and the court finds they did follow, the specific property of the trust through its mutations in form."

On the former appeal—which resulted adversely to the defendant—there were several errors of law that do not occur in the present record. There is, also, now additional evidence which, it is claimed by appellant, establishes the trust and the identity of the trust fund. There is also another important difference between the case as then and as now presented. On the present appeal many of the facts relied upon by the appellant are specifically found by the court, and on this appeal must be accepted as true.

The case as found by the court is in effect as follows: Plaintiffs and defendant Mary F. Byrne are the children of the deceased, Michael F. Byrne, Jr., and of Mary E. Byrne.

The mother died January, 1878, leaving a will, which was duly probated, wherein she appointed her husband executor and devised and bequeathed him in trust, for the support, maintenance, and education of the children, all her property, real and personal. Byrne accepted the trust, and as trustee came into possession of two thousand five hundred dollars as part of the trust fund; and on the thirty-first day of December, 1883, invested this sum, with five hundred dollars of his own, in the purchase of "the personal property particularly described in subdivision 4 of said amended complaint," taking the title in his own name, the property so purchased and described consisting of a drug store, stock, fixtures, etc., in the town of Grass Valley.

But the court found, in effect, that neither the personal property so purchased nor the proceeds thereof were traced and identified by the evidence.

The sole question in the case is as to the sufficiency of the evidence to support the finding last cited. The same question is therefore presented as in the former case, viz.: "Whether or not plaintiffs [have] followed the trust fund in its mutations, and have sufficiently identified it to avoid the rule laid down in *Lathrop v. Bampton*, 31 Cal. 17,¹ which places the beneficiary who is unable so to follow the trust funds in the position of a general creditor of the estate." But as it is now found that the original trust fund was invested in the property described in the complaint, the question will relate only to the proceeds of the trust property.

In addition to the facts found, the following facts appear from the evidence: The business was carried on in the same location by Byrne at a profit of from one hundred and seventy-five to two hundred dollars a month, until his death, December 7, 1887, at which time, as appears from the petition of the administratrix, it was worth five thousand dollars. It was afterward carried on at a loss by the administratrix until it was sold for seventeen hundred dollars. The trust was always acknowledged by Byrne. The court does not find whether the five hundred dollars used in the purchase by Byrne was intended by him as an advance to the children,

¹ 89 Am. Dec. 141.

or as an investment on his account. But the circumstances of the purchase of the drug store as detailed by Mrs. Meeks, and his own declarations to his children, and to Mr. Kitts, his attorney, indicate that the former was the case; and, on the evidence, we think the court should have so found. Nor, were it otherwise, would the case be materially affected. The investment of the five hundred dollars on his own account would simply have given to Byrne a corresponding undivided interest in the concern; or if this should be considered as a mingling of the trust property with that of Byrne, the whole, on the principle of accession, would have belonged to the trust fund. (Civ. Code, sec. 1025 et seq.) It does not appear that any money of his own was subsequently put into the business by Byrne; but from the fact that the store was always a paying concern, and from his narrow circumstances as detailed by Kitts, the contrary is most probable. Were it otherwise—upon the principle already cited—the property thus mingled with the trust fund would have become part of it. (Civ. Code, sec. 1025 et seq.) It is also clear from the evidence that the advance of five hundred dollars originally made by him, and other advances, if any, have been in fact repaid, and that on an accounting at the death of Byrne the balance would have been largely against him.

The question of identity does not relate to the specific items of stock, fixtures, etc., constituting the drug store at the time of the purchase, but to the drug store itself, which is to be regarded collectively as a thing or entity; or, as it would be called in the civil law, a *universitas rerum*. (Mackeldy's Roman Law, secs. 159, 162.) The material things belonging to the concern did not constitute the collective thing or *universitas* spoken of as the drug store or business, but were only mutable and transitory parts of it. It was this that constituted the trust fund in question, which was something different from the material things momentarily constituting it and remained the same, though these, like the particles of water in a river, were continually changing. At the time of the sale, therefore, "it was [still] the identical property originally covered by the trust." (*Orcutt v. Gould*, 117 Cal. 316.) "The identity of a trust fund consisting of money (it

is said in the case cited), may be preserved, so long as it may be followed and distinguished from all other funds, not by identifying the individual pieces or coins, but by showing a separate and independent fund or value readily distinguishable from all other funds." And *a fortiori* is this true when the fund consists not of money, but of tangible and distinguishable items of property. The case is, therefore, not a case of the conversion of the trust fund into another species of property, but of a clearly identified fund that has retained its original form and essence. Indeed, it is in effect so found. For the finding is that the trust money was invested in the property described in subdivision 5 of the complaint, which refers unequivocally to the property as it existed at the time of the sale, and thus identifies it as it then stood with the property as originally purchased. The subsequent finding of the court to the contrary must be regarded as the result of an erroneous theory as to what the property to be identified was; that is to say, to the error that the trust property consisted of the chattels momentarily constituting the fund at the time of the purchase, and not of the fund itself.

As between the deceased and the plaintiffs the right of the latter are manifest; nor is there any question here as to the rights of creditors of the concern. The respondent is merely a general creditor of the estate, who loaned money to the deceased in his lifetime. Possibly his (Byrne's) apparent ownership of the property in question gave him a fictitious credit; but if the property in question was originally the property of the plaintiffs, and if—as it now is—it has been identified, he has no equities superior to theirs. The sole question, therefore, is as to the sufficiency of the identification of the trust fund; and as in our opinion this has been satisfactorily made out, the order denying the plaintiffs' motion for a new trial must be reversed.

Some directions will, however, be necessary with reference to the further proceedings. The suit was brought upon the theory that upon the death of Byrne, the trustee, the trust ceased and the trust fund became equitably vested in the children. But by reference to the will it will be seen that the property was not devised in trust for the children generally,

but merely in trust for their "maintenance, support, and education." The trust, therefore, cannot extend beyond their lives; and it follows that the remainder was undisposed of by the will, and passed by intestate succession one-third to the father and two-thirds to the children. (Civ. Code, sec. 1386, subd. 1.) It will be proper, therefore, for the court to appoint a trustee to take charge of the trust fund as successor to the deceased.

The order appealed from is reversed and the cause remanded for new trial and further proceedings in accordance with the above opinion.

[S. F. No. 1533. Department One.—October 27, 1900.]

E. A. PARKER, Respondent, v. STEPHEN OTIS and JOSEPH F. GASSMAN, Partners, etc., Appellants.

CONTRACT TO BUY AND SELL STOCKS ON MARGIN—RECOVERY OF MONEY BY UNDISCLOSED PRINCIPAL.—An undisclosed principal may recover money paid by his agent, without disclosing the agency, upon a contract for the purchase and sale of the stocks of mining corporations on margins, in violation of section 26 of article IV of the constitution.

ID.—CONSTRUCTION OF CONSTITUTION—RECOVERY BY PARTY PAYING—AGENCY.—The constitution, in providing that "any money paid on such contracts may be recovered by the party paying it," is not to be literally construed as confining the recovery to the particular person handing over the money or as taking away the remedy of the owner of the money paid, because he employed an agent to pay the money for him.

ID.—EVASION OF CONSTITUTION—DUTY OF COURT.—The constitution will not be so construed as to permit an evasion of it; but it is as much the duty of the court, in giving effect to it, to see that it is not evaded as that it is not directly violated.

ID.—END CONTROLLING FORM OF TRANSACTION.—The end to be attained, and not the form of the transaction, must determine the question of the right of recovery, under the provisions of the constitution.

ID.—PRESUMPTION—KNOWLEDGE OF OWNER'S RIGHT OF RECOVERY—KNOWLEDGE OF OWNERSHIP.—The defendants must be presumed to have known that they were receiving money which could be recovered by its owner; and it is immaterial to them whether they knew or did not know who was the owner of the money paid to them.

ID.—CAUSE OF ACTION—VALIDITY OF AGENCY.—The cause of action of the owner of the money paid in violation of the constitution does not depend upon the validity of the agency under which it was paid, but rests upon the provisions of the constitution making the transaction void and giving the right to recover the money paid.

ID.—CONFLICTING EVIDENCE AS TO OWNERSHIP OF MONEY—SUPPORT OF VERDICT.—Where there is conflicting evidence as to whether the plaintiff was the owner of the money paid, or whether plaintiff had given the money to the person paying it, the verdict of the jury based upon plaintiff's ownership will not be disturbed upon appeal.

ID.—CONTRACT TO BUY AND SELL "STOCKS"—INCORPORATED COMPANIES—CONSTRUCTION—EVIDENCE—MOTION FOR NONSUIT.—A written contract to buy and sell "stocks" must be construed as referring to the stocks of incorporated companies; and under an issue taken upon an alleged contract to buy and sell mining stocks of certain mining corporations on margin, evidence that the money paid was for the purchase of "stocks," which were described in statements furnished by the defendants as "200 Kentuck," "100 Potosi," "100 Yellow Jacket," and the like, sufficiently shows that they were the shares of incorporated companies to preclude the granting of a motion for nonsuit, for failure of direct evidence of that fact.

ID.—FEDERAL CONSTITUTION NOT VIOLATED—POLICE POWER OF STATE.—The constitutional provision of this state for the recovery of money paid for the purchase and sale of stocks on margin is a proper exercise of the police power of the state, and is not in conflict with any of the provisions of the federal constitution.

ID.—DISTINCTION BETWEEN BONA FIDE AND GAMBLING CONTRACTS—PROVINCE OF COURT.—If our constitution fails on its face to distinguish between *bona fide* and gambling contracts, that does not render it the less a proper police regulation; for the question to be determined by the court in each case is whether the constitution is violated, and the court will always see that legitimate business transactions are not brought under its ban.

ID.—PROHIBITED TRANSACTION—CONTRACT WITH STOCK BROKERS—PAYMENT OF "MARGIN"—SECURITY FOR ADVANCES AND COMMISSIONS—POWER OF SALE—DELIVERY OF OTHER STOCKS.—The payment of a mere margin of the cost price of stocks to stock brokers, as agents for the purchase of stocks, under an agreement that the brokers were to make advances for the purchaser, and hold the stocks purchased as security for their advances, commissions, and agreed interest, with power to sell the same to protect their interest, without delivery to the purchaser of any particular shares of the stock purchased, but with readiness of the brokers at any time on demand to deliver a like number of shares upon payment of all balance due, is within the prohibition of the constitution.

ID.—ADMISSION AS TO FACTS—REMARK OF COURT—QUESTION OF LAW—

“MARGIN” CONTRACT—INSTRUCTIONS.—Upon an admission by defendants that their witnesses would testify to certain facts, showing a “margin” contract, a remark of the court that “the admission tends to support plaintiff’s theory of the case rather than defendants,” is but the expression of opinion on the question of law as to whether the facts, as admitted, constituted a “margin” contract, and did not invade the province of the jury nor prejudice the defendants’ case; and the court properly instructed the jury that the facts of the case supported the plaintiff.

ID.—EVIDENCE—CONCLUSIONS OF WITNESSES NOT ADMISSIBLE.—Upon a

question asked of plaintiff’s sister whether she owed defendants, the answer, “Yes, on a margin proposition,” states a conclusion not responsive to the question, which should be stricken out on defendant’s motion. To a question asked of plaintiff: “Did you delegate authority to your sister to act as your agent and to purchase or deal in stocks on the market with any broker?” an objection of the defendants that it calls for the conclusion of the witness should be sustained. A witness should be confined to facts, leaving conclusions to be drawn from them to the jury or the court.

ID.—HARMLESS ERROR.—Error in permitting the conclusions of the witnesses is not prejudicial, where the facts were fully stated by the witnesses, and the jury drew its own conclusions from the facts, under the instructions of the court.

ID.—READING TO JURY IRRELEVANT PART OF CONSTITUTION.—The fact that the court, in reading to the jury the provisions of the constitution on the subject of contracts for the sale of stocks on margin, read also the first part of the section containing provisions relating to the irrelevant subject of lotteries and gift enterprises cannot be material or prejudicial to the defendants.

ID.—INSTRUCTIONS—REQUEST AS TO ABSENCE OF SYMPATHY—CHARGE AS TO ABSENCE OF EQUITIES.—The refusal of a requested instruction that “plaintiff is entitled to no sympathy” from the jury is not prejudicial to the defendants, where the court charged the jury that “there are no equities between these parties, and their rights are to be determined by the strict rules of law.”

ID.—REQUEST AS TO ABSENCE OF PRESUMPTION—CHARGE AS TO PREPONDERANCE OF EVIDENCE.—The defendants cannot complain because the court refused their request to tell the jury “that it is never to be presumed that parties deliberately enter into contract in violation of the constitution,” where the court clearly charged the jury that they must find for the defendants unless they find from the preponderance of the evidence that the transactions in question were margin transactions within the meaning of the constitution, as the court had declared that meaning.

Id.—INTEREST.—A plaintiff recovering money paid on a contract for sales of stock on margin is not entitled to an allowance of interest from the commencement of the action.

Id.—STATUTE OF LIMITATIONS—"PENALTY"—MONEY HAD AND RECEIVED—DEMAND AND REFUSAL.—An action to recover the money paid in violation of the constitution is not barred within one year, as being an action to recover a "penalty" within the meaning of section 340 of the Code of Civil Procedure; but the action is for money had and received, in which recovery cannot be had except after demand and refusal.

Id.—CONSTITUTIONAL PROVISION REMEDIAL—ACTION GIVEN NOT PENAL DAMAGE MEASURED BY MONEY PAID.—The provision of the constitution relative to unlawful contracts for the sale of stocks on margin and for the recovery of money paid thereon is not penal, but remedial; and the action which it gives is not a penal action merely because the contract is unlawful. The recovery therein cannot be said to be without reference to the actual damage sustained, the damage being measured by the money paid.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

Deal, Tauszky & Wells, for Appellants.

A. Everett Ball, for Respondent.

CHIPMAN, C.—Action to recover four hundred and seventy dollars alleged to have been paid to defendants by plaintiff for the purchase of stocks of mining corporations on margin. The cause was tried by the court sitting with a jury, and plaintiff had the verdict. The appeal is from the judgment and from an order denying defendants' motion for a new trial.

The evidence was that the purchases were all made by plaintiff's sister acting, as is claimed by plaintiff, as his agent, and that he personally had no dealings whatever with defendants and defendants had no knowledge that Miss Parker was acting for plaintiff.

Defendants claim: 1. That the money paid by plaintiff's sister was in fact hers and not his, and if there can be any recovery it must be by her alone; and 2. That if the money could be considered plaintiff's, then he attempted to

delegate authority to his sister to engage in an illegal transaction, thus creating an agency which the law will not recognize.

Section 26, article IV, of the constitution provides as follows: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction."

1. Had the plaintiff personally paid the money he could have recovered it, and we see no reason why the remedy given him by the constitution should be taken away because he employed an agent to pay the money for him. The constitution treats the transactions in question as harmful in their tendency, and because harmful has sought to eradicate the evil not only by declaring the contract void, but also by giving a right of action to recover the money paid under it. Being *in pari delicto*, the purchaser of stocks would be left where the law finds him but for the remedy given by the constitution. It would be an exceedingly narrow and an altogether unwarranted construction of the constitution to hold literally to the words of that instrument—that the money may be recovered only "by the party paying it"; i. e., by the particular person who handed over the money to the seller or in whose name the business might happen to be conducted.

In *Sheehy v. Shinn*, 103 Cal. 325, it was said: "To give effect to the constitution it is as much the duty of the courts to see that it is not evaded as that it is not directly violated." Upon appellants' construction it would be a simple matter to evade the law by interposing an agent of an undisclosed principal to carry on the business with the broker.

In *Cashman v. Root*, 89 Cal. 373¹, it was urged that the broker was the agent of his customer, and that he was not liable for that reason. The court held him liable as the instrument through which the illegal end was accomplished, and he being privy to the design the same result would follow as if he were the seller; and it was said: "The end attained, and not the form of the transaction, must determine the question."

¹ 23 Am. St. Rep. 482.

Defendants are presumed to have known that they were receiving money which could be recovered by its owner if he chose to assert his right; it was immaterial, therefore, whether or not they knew who was the principal for whom Miss Parker was acting. Ordinarily, where an agent acts for an undisclosed principal, either the agent or the principal may sue; and while it is true that one cannot delegate authority to do an illegal act, the cause of action here does not depend on the validity of the agency created by plaintiff, but it rests on the provisions of the constitution which made the transaction void and gave a right to recover the money paid.

2. There is evidence tending to show that plaintiff's sister was acting as his agent in paying the money to defendants; he so testified directly. The cross-examination of Miss Parker gives some ground for doubt as to whether she was acting for herself or for her brother, and would perhaps have justified the jury in finding that the money paid by her to defendants had been given to her by plaintiff and became her own and was hers when paid on account of the stock purchases. But there was evidence supporting the view taken by the jury, and we are not permitted to interfere with its conclusion.

3. The unverified complaint alleges that "defendants heretofore, and within two years last past, contracted with plaintiff to buy and sell mining stocks, portions of the capital stock of certain mining corporations, for plaintiff on a margin to be furnished by said plaintiff," etc. The answer is a general denial and puts in issue the above averment.

There is no direct evidence that there existed a corporation or corporations and that the stocks mentioned in the complaint were shares of the capital stock of such corporation or corporations. This was urged as ground for defendants' motion for nonsuit, and the denial of the motion was assigned as error; and was also specified as one of the particulars in which the evidence is insufficient to support the verdict. The evidence was that the money paid to defendants was for the purchase of "stocks"; and witnesses speak of certificates of stock for a certain number of shares which were purchased in the Pacific Stock Exchange by defendants. A statement of defendants' transaction with Miss Parker

was furnished by defendants; in this statement some of the same stocks referred to by plaintiff's witnesses are enumerated, and in it appears the amount of money paid at certain dates, with a description of the stocks as follows: "200 Kentuck," "100 Potosi," "100 Yellow Jacket," "50 Challenge," and the like. In the written contracts between the parties defendants say: "We will act as agents and brokers in the purchase and sale . . . of stocks and bonds for our principals," etc.

Webster gives the following definition of the word "stocks": "Property consisting of shares in joint stock companies." In Anderson's Law Dictionary the following definition is given: "The capital of an incorporated company in transferable shares of a specified amount." We think it reasonably clear that the stocks referred to by the witness and in the written contracts of the parties were stocks in the sense of the above definition and were shares of incorporated companies.

4. Defendants contend that our constitutional provision is in conflict with section 1 of the fourteenth amendment to the federal constitution, in abridging the privileges and immunities of citizens of the United States and depriving persons of liberty and property without due process of law, and denying persons making margin contracts the equal protection of the laws; that it interferes with the freedom of contract, and is beyond the police power of the state, inasmuch as it is not confined to mere gaming contracts **or contracts for the payment of differences**, but prohibits legitimate business transactions. This defense was specially pleaded in the answer and was urged on the motion for nonsuit, and was assigned as one of the particulars wherein the verdict is against law.

Chief Justice Shaw, in defining the police power of the state, said: "All property in this commonwealth is . . . held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." (*Commonwealth v. Tewksbury*, 11 Met. 55.)

In *Cashman v. Root*, *supra*, reference was made to the causes which led to the adoption of the constitutional provision in question. It was pointed out that a large part of the community had been set wild by stock speculations, and that "the rapid fluctuations of stock afforded unusual inducement to stock gambling," and it was said: "By skillful manipulation of the markets a few fortunate ones had been able to take advantage of the existing mania and made large fortunes for themselves, at the cost of widespread financial ruin and distress. People of small means were enabled by brokers to speculate largely at that time through these very purchases on margin. Of these matters this court will take judicial notice, and, in doing so, cannot doubt that this inhibition was intended to strike down this practice." This class of speculative investments must be conceded to possess some of the elements of gaming or gambling contracts, and while it may be that but for the constitutional provision they would not be held void, or, if held void, that the law would furnish no relief to parties *in pari delicto*, still their actual as well as possible injurious effect upon the community and its welfare we think clearly brings them within the police power of the state to regulate or prohibit. For a discussion of the police power of the state, see Judge Sanderson's opinion in *Ex parte Smith*, 38 Cal. 702; also Cooley's Constitutional Limitations, 707. Laws in several states of the Union have been enacted to accomplish the same result aimed at by our fundamental law, and, so far as we are advised, have never been successfully attacked as in conflict with the federal constitution. (See statutes of several states referred to in Cook on Stock and Stockholders, sec. 342. See, also, History of Stock Jobbing Acts, c. VIII; Dos Passos on Stock Brokers, ed. 1882, p. 382.)

If the provision in question on its face fails to distinguish between *bona fide* contracts and gambling contracts as is urged, it is none the less a proper police regulation, for the question remains to be determined in each case whether the transaction is in contravention of the constitution. (*Kullman v. Simmens*, 104 Cal. 595; *Sheehy v. Shinn*, *supra*). The court will always see that legitimate business transactions are not brought under the ban.

5. It is claimed that the facts in this case do not bring it within the constitutional condemnation. Briefly, the transactions were as follows: Plaintiff paid to defendants certain money, accompanied by an order to purchase certain stocks; defendants went into the stock board, bought and paid for these stocks in full at the market rate; defendants then credited plaintiff with the money paid by him (which was always less than the amount paid for the stocks by defendants, or, in other words, was but a margin of the cost), and by agreement held the stocks as security for their commissions, advances, and for the accumulating interest thereon, with the power to sell the stocks to protect themselves against a decline in value; defendants did not keep the particular stocks purchased, but had others of like character, and could and would have delivered a like number of shares to plaintiff upon full payment of all balances due at any time upon demand; defendants acted only as agents of plaintiff and had no interest in the stocks beyond their commissions, advances, and the agreed interest. So far as we can perceive, the deal was similar to that in the cases heretofore passed upon by this court and held to be within the provisions of the constitution. (See *Sheehy v. Shinn*, *supra*, and cases there referred to; *Kullman v. Simmens*, *supra*.)

6. It is contended that the court invaded the province of the jury in remarking, as to an admission that defendants' witnesses would testify to certain facts, as follows: "The admission tends to support plaintiff's theory of the case rather than defendants'." It is urged that the remark was prejudicial, particularly in view of an instruction asked by defendants, and refused by the court, to the effect that whether the transactions in question are in contravention of the constitution is a question of fact to be determined by the jury from all the circumstances (citing *Kullman v. Simmens*, *supra*); whereas the court told the jury that it is a question of "mixed law and fact." The court instructed the jury that they were "to apply to that evidence these instructions [the instructions previously given] as to the law." The admission referred to presented the question as to whether the facts as admitted constituted a "margin" contract, and this was purely a question of law. The court in its remark assumed the facts to be as admitted, and so left them with the jury, but it intimated,

as it later on properly instructed the jury, that as matter of law the facts supported plaintiff; and in this we think the court did not err, and the remark could not have prejudiced defendants' case.

7. When Miss Parker was testifying for plaintiff counsel asked her: "Do you owe Otis & Co. any money?" Defendants' objection was overruled and the witness answered: "Yes, on a margin proposition." Defendants moved to strike out the latter part of the answer as not responsive to the question and as being a conclusion. The court overruled an objection to the following question asked plaintiff: "Did you delegate authority to your sister to act as your agent and to purchase or deal in stocks on the market with any broker?" The motion in the one case should have been granted and the objection in the other should have been sustained. A witness should be confined to facts, leaving conclusions to be drawn from these facts to the jury or court. The defendants, however, were not injured, because the facts were fully stated during the examination of the witnesses, and the jury could and no doubt did draw its own conclusions from these facts under the instructions of the court as to what constituted margin contracts.

8. Error is claimed because the court, in its instructions, read to the jury the whole of section 26, article IV, of the constitution, the first part of which relates to lotteries and gift enterprises. It was not necessary to the case to read more than the latter part of the section, but reading all of it could not have been prejudicial to defendants. Error is claimed in refusing to give certain instructions asked by defendants, or in modifying them as given.

We have carefully examined these offered instructions and find that such of them as were essential to a proper presentation of the issues to the jury were given as asked or with such modifications as fairly placed the matters in controversy before the jury. Those which were refused were not such as could enlighten the jury or aid them in reaching a right conclusion. For example, it could not have injured defendants by refusing to tell the jury that plaintiff "is entitled to no sympathy from you"—the court, however, did tell them that "there are no equities between these parties, and their rights are to be determined by the strict rules of law," and this was

about equivalent to telling them that neither party was entitled to their sympathy. Again, defendants cannot complain because the court refused to tell the jury "that it is never to be presumed that parties deliberately enter into contract in violation of the constitution." The court very clearly pointed out to the jury that they must find for the defendants unless they should find from the preponderance of the evidence that the transactions in question were margin transactions within the meaning of the constitution as the court had declared that meaning. The instructions as given were a remarkably clear exposition of the law, and the jury were repeatedly cautioned as to its application to the facts and as to the rules which should govern them in judging of the facts. We see no prejudicial error in giving or refusing any instructions.

9. There remains but one question undisposed of. The court instructed the jury to allow interest from the commencement of the action, and this is urged as error. We think the question is settled by the decision in *Baldwin v. Zadig*, 104 Cal. 594.

It is advised that the judgment be modified by striking therefrom the amount allowed for interest, and thus modified that the judgment and order be affirmed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is modified by striking therefrom the amount allowed for interest, and, thus modified, the judgment and order are affirmed. Van Dyke, J., Garoutte, J., Harrison J.

On petition for rehearing, the court, in Bank, rendered the following additional opinion, which was dated November 26, 1900, and filed November 27, 1900:

THE COURT.—A point overlooked in the commissioner's opinion is the defense of the statute of limitations. The claim is that subdivision 1, section 340, of the Code of Civil Procedure, applies, because this is an action upon a statute for a penalty or forfeiture, and, if so, must have been commenced within one year.

What is meant by a statutory penalty was defined in *Los Angeles v. Ballerino* 99 Cal. 593, to be "one which an individual is allowed to recover against a wrongdoer as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained, or one which is given to the individual and the state as a punishment for some act which is in the nature of a public wrong. The action to recover such a penalty is a penal action founded upon a statute, and is the action which, under section 340 of the Code of Civil Procedure, must be brought within one year."

There is nothing penal in the constitutional provision; it is simply remedial. The action is for money had and received, and recovery cannot be had except after demand and refusal. (*Baldwin v. Zadig*, 104 Cal. 594.) But for the constitution there could be no recovery. If the constitution, in effect, makes the margin sales of stock unlawful, it does not follow that the action given to recover the money paid for the purchase of such stock is a penal action, or is for the recovery of a penalty, and certainly the recovery cannot be said to be "without reference to the actual damage sustained," for there is no damage except as measured by the money paid.

Rehearing denied.

[S. F. No. 1736. Department Two.—October 27, 1900.]

JAMES L. PATTERSON, Appellant, v. BARTLETT DOE
et al., Executors, etc., Respondents.

STATUTE OF LIMITATIONS—ORAL CONTRACT—DEED OF MINE—VERBAL AGREEMENT TO PAY UPON RESALE.—A cause of action upon an oral contract to pay a specified sum upon the resale of a mine deeded by the promisee to the promisor, together with the sale of other mines belonging to the promisor, accrued at the time of such resale, and is barred within two years thereafter, under subdivision 1 of section 339 of the Code of Civil Procedure.

ID.—ACTION AGAINST EXECUTORS—NONSUIT.—In an action upon such cause of action against the executors of the deceased promisor,

the executors are entitled to a nonsuit, on the ground that the action is barred by the statute.

1D.—EFFECT OF DEED OF MINE—INSTRUMENT IN WRITING.—The deed of the mine cannot be considered as a written instrument taking the oral agreement out of the statute, there being no acknowledgment or promise contained in the deed relative to the verbal understanding between the parties. The cause of action is not founded upon an instrument in writing, within the meaning of the code, merely because such an instrument would be a link in the chain of evidence establishing the cause of action, if it does not contain or prove the contract sued upon.

1D.—LETTER UPON PREVIOUS UNCONSUMMATED TRANSACTION—ABSENCE OF PROMISE—IRRELEVANCY.—A letter from the decedent written in relation to a previous unconsummated transaction for the transfer of the mine by plaintiff directly to another party, to the effect that “if the sale goes through, the money comes through me,” does not contain a promise, and has no relevancy to the verbal contract made at the time of the deed to the decedent.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion.

Reddy, Campbell & Metson, for Appellant.

R. E. Houghton, and Houghton & Houghton, for Respondents.

GRAY, C.—The judgment was for defendants, and plaintiff appeals from an order denying his motion for a new trial.

This action was commenced April 8, 1895, to recover twenty thousand dollars on a contract alleged to have been entered into between plaintiff and John S. Doe on or about the first day of November, 1887, for a sale of the Invincible mine. The defendants pleaded subdivision 1 of section 339 of the Code of Civil Procedure, limiting the right of action “upon a contract, obligation, or liability not founded upon an instrument of writing” to two years; and at the conclusion of plaintiff’s evidence, on the trial, defendants moved for a nonsuit, stating as the third ground of said motion that “if the plaintiff ever made any agreement with Doe for the sale to him, Doe, of the Invincible mine, the agreement was not

in writing, but by parol; and the case is barred by subdivision 1, section 339, of the Code of Civil Procedure." We think the motion was properly granted on the ground quoted.

On March 31, 1887, J. S. Doe and John R. Scupham entered into a written agreement, whereby said Doe agreed to sell to Scupham certain mining property in the Calico mining district for three hundred thousand dollars on demand and payment of said sum by Scupham between the 1st and 15th of July, 1887. This time was subsequently extended to September 1, 1887. Scupham had an arrangement by which he was intending to sell this property to Morton and Robinson at an advanced price; and on consultation between Scupham and Doe it was thought advisable to secure a contract with plaintiff for the sale of the Invincible mine, the intention being to enlist plaintiff's interest in effecting a sale of Doe's mining property, as well as his own, to said Morton and Robinson. Accordingly, after some negotiations, Scupham obtained a written contract with Patterson dated July 15, 1887, wherein Patterson agreed to aid Scupham in effecting a sale of the Doe mining property in the Calico mining district under the contract then existing between Scupham and Doe, and, in case the sale was consummated, to convey to Scupham the Invincible mine; in consideration of which Scupham agreed, in case of the consummation of said sale under the pending contract or any extension thereof, to pay to Patterson twenty thousand dollars. Soon after the execution of the last-mentioned contract Patterson wrote a letter to Scupham stating that he wanted the money coming to him to come through Doe. Thereupon Scupham handed the Patterson contract and said letter over to Doe and said to him: "Now the matter is in your hands, Mr. Doe," and Doe replied: "Yes, it is in my hands, and I will attend to it." Thereafter, at the request of Doe, plaintiff Patterson made a deed of the Invincible mine to Robinson, one of the parties with whom negotiations were being had for the sale of all the mines. This deed was forwarded to Doe and the receipt thereof acknowledged in a letter as follows:

"San Francisco, Nov. 15, '87.

"J. L. Patterson.

"Dear Sir:· Yours with deed of Invincible is at hand. If the sale goes through, the money comes through me, also Tucker's and Peterson's 20,000—5,000—2,500. Scupham, I expect, goes to Calico to-day, also Myers. This business, if at all will not be closed much before January 1st. If it does then I don't want many supplies on hand at that time as I am not paid for them, and in ordering, calculate on this. I have the use of the mill until the money is paid.

"J. S. DOE."

Patterson was superintendent for Doe in the mines, and said Tucker and Peterson were also employed in some capacity therein. The figures in the letter signify that of the proceeds of the contemplated sale twenty thousand dollars was to go to Patterson, five thousand dollars to Tucker, and two thousand five hundred dollars to Peterson. It was agreed between Doe and Scupham that this twenty thousand dollars to Patterson should be paid out of the excess over three hundred thousand dollars that Scupham was to get from Robinson and Morton for the property. It was not to come out of the three hundred thousand dollars that Doe was to receive for his property. The time for performance of the Scupham and Doe contract expired, and no sale was made under it. Negotiations with Robinson and Wilson were still continued, however, and late in the fall of 1887 they were given a thirty-day written option on the property, and a deed from Doe of his property, together with the deed from Patterson to Robinson of the Invincible mine, was deposited in escrow with the Anglo-Californian Bank. It was on receipt of this deed from Patterson to Robinson for the purposes of said escrow that Doe wrote the above-quoted letter of November 15, 1887, to Patterson. The negotiations with Robinson and Morton came to an end finally without effecting the sale of anything, and the deeds were withdrawn from the bank. Thereafter Doe acquired other mines and continued negotiations for the sale of his mining properties with various parties until, on July 3, 1891, he sold and conveyed to Thomas B. Bishop all his mining property, including the Invincible mine, which

Patterson had previously conveyed to him by deed of date June 23, 1891, which recited a consideration of ten dollars. This sale to Bishop was certainly not made under any previous written contract with Scupham; this seems to be conceded by both parties to this appeal. Nor do we think that the evidence discloses any other agreement or contract in writing upon which the complaint in this case can rest so as to avoid the bar of the two-year statute of limitations pleaded in the answer. The appellants rely on the letter from plaintiff to Doe, dated November 15, 1887. This letter contains no promise to pay anything; and it is clear that it had no reference to the sale which was finally consummated by Doe. It is equally clear that the twenty thousand dollars spoken of in that letter had no reference to any portion of the money which was finally received for the mining properties, but, as explained by the testimony of Scupham, the twenty thousand dollars therein referred to was to come out of the amount in excess of the three hundred thousand dollars coming to Doe on the consummation of the sale to Morton and Robinson. The sale which was finally made was an entirely different transaction from the one contemplated to Morton and Robinson, and a letter which was evidently, from its terms, intended to apply only to the former cannot be held to apply in any way to the latter transaction. The deed from plaintiff to Doe is itself a written agreement, sufficient, perhaps, to take the case out of the statute of frauds as contended by appellants, and were it not for the statute of limitations, would no doubt entitle plaintiff to recover; but the deed is no answer to the two-year statute of limitations, because it contains no promise to pay the plaintiff anything. As we understand the rule, it is this: to avoid the two-year statute pleaded in the answer in the action must be based upon a promise made in writing. In construing sections 337 and 339 of the Code of Civil Procedure, this court, in *McCarthy v. Mt. Tecarte Land etc. Co.*, 111 Cal. 328, at page 340, uses the following language: "But the cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instru-

ment would be a link in the chain of evidence establishing the cause of action. In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the nonperformance of which the action is brought." This language was quoted with approval in *Thomas v. Pacific Beach Co.*, 115 Cal. 136, in which latter case suit was brought on an implied *assumpsit* to recover back money paid for land under a written contract for the sale thereof; no agreement to restore the money on failure to convey the land being contained in the contract, it was held that the cause of action was barred in two years after the last payment. (See, also, *Todd v. Board of Education*, 122 Cal. 106; *Lattin v. Gillette*, 95 Cal. 317¹; *Chipman v. Morrill*, 20 Cal. 130.)

The trial judge seems to have been correctly of the opinion that there was sufficient evidence to show that there was an understanding between plaintiff and Doe that on a resale of the Invincible mine with the other mines Doe was to pay plaintiff twenty thousand dollars. This being so, the cause of action accrued on the date of the execution of the deed to Bishop, and, this understanding resting in parol, the cause of action would be barred in two years after that date, and more than a year before the commencement of this action.

Appellant's motion to amend the complaint by adding a count on a *quantum meruit* was properly denied, because the plea of the two-year statute of limitations would still be good to the complaint as thus amended.

The statute of limitations bars a recovery by appellant, however correct his position may be on the other points presented on this appeal. We therefore refrain from considering those points.

The order denying a new trial should be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order denying a new trial is affirmed.

McFarland, J., Temple, J., Henshaw, J.

¹ 29 Am. St. Rep. 115.

[S. F. No. 1699. Department Two.—October 27, 1900.]

CHARLES W. SUTRO, Respondent, v. EASTON, ELDRIDGE & CO., Appellant.

ACTION FOR SERVICES—SECURING CONTRACT FOR SALE OF LAND—REFUSAL OF INSTRUCTION COVERED BY CHARGE—DISPUTE AS TO SERVICES.—In an action for services rendered by the plaintiff to the defendant in securing for defendant a contract for the sale of land, the refusal of an instruction requested by the defendant that if the solicitations of the defendant had in no way influenced the securing of the contract, and that if the party making the contract had prior to such solicitations placed the property for sale with the defendant, or had determined to do so, the jury should find for the defendant, is not ground for reversal, where the language used in the instructions given and not objected to was broad enough to cover the disputed point whether the plaintiff was instrumental in bringing the sale of the property to the defendant, and plainly presented that question to the jury.

ID.—DOUBT AS TO TERMS OF CONTRACT—VERDICT TO APPELLANT'S ADVANTAGE.—When the evidence showed that plaintiff had had different contracts with the defendant as to the securing of contracts of sale, one for one-third of defendant's commissions, and one for one-half thereof, and there was doubt as to which contract was applicable to the case, the appellant cannot urge error in a verdict to his advantage for one-third of the commission, instead of one-half thereof as claimed by the plaintiff.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion.

Chickering, Thomas & Gregory, for Appellant.

William H. Jordan, for Respondent.

GRAY, C.—Appeal by defendant from a judgment in plaintiff's favor and from an order denying defendant's motion for a new trial.

The action was brought to recover two thousand four hundred dollars claimed by plaintiff to be due from defendant

“for services rendered by plaintiff to defendant within two years last past, at the personal instance and request of defendant.” The points urged for a reversal are two, only.

1. It is claimed the court erred in refusing an instruction requested by appellant which reads as follows: “If you find from the evidence that the solicitations of the plaintiff in no way influenced the mind of the executor of the Cullom estate, and that said executor had, prior to such solicitation, placed the property for sale with the defendant, or had fully determined so to do, you must find for the defendant.”

The court instructed the jury as follows: “The burden of proof is on the plaintiff to show that the services performed by him secured to defendant the sale of the property of the Cullum estate.

“If you find from the evidence that the services rendered by the plaintiff in no way tended to secure to the defendant the sale of the property of the Cullum estate, you must find a verdict for the defendant.

“If you find from the evidence that, at the time of the promise made to the plaintiff by the president of the defendant, the executor of the Cullum estate had placed the sale of the property of the estate in the hands of the defendant, and that this fact was unknown to the president of the defendant at the date he made such promise, you must find for the defendant.”

The evidence on behalf of respondent was to the effect that he had an understanding with defendant whereby he was to get a commission upon whatever property he brought to defendant and was thereafter sold by it; that plaintiff told Wendell Easton that he thought he could get the Cullum estate, and Easton replied, “That’s right, go ahead and work the thing up”; that in pursuance of this understanding he saw Mr. Granniss, the executor of the Cullum estate, and told him that he was working for defendant on commission and that he would like to get the Cullum estate, and Granniss replied, “My boy, you shall have it; nobody shall have it but you.” Plaintiff reported this conversation to Mr. Easton and Easton replied, “That is right, Charlie, go after him.” Subsequently, plaintiff took Mr. Granniss into Mr. Easton’s private

office and a written contract was obtained from him, under which the sale was subsequently made by defendant. On cross-examination plaintiff testified: "I think the oral conversation at which Mr. Easton told me he would give me one-half commissions was in September." In brief, plaintiff's evidence tended to show that he brought the property of the Cullum estate into defendant's house, and defendant subsequently sold it, receiving a commission of four thousand seven hundred and ninety-four dollars.

The evidence of defendant tended to show that Granniss had made up his mind to give the sale of the Cullum estate to defendant, and had already made arrangements with defendant to that end before he talked with plaintiff about the matter at all, and that plaintiff's talk had no influence on Granniss in the premises. The precise point in dispute between the parties seems to be as to whether plaintiff was instrumental in bringing the sale of the Cullum estate property to defendant.

The language used in the instructions given, and not objected to, was broad enough to cover this point, and plainly present it to the jury. If Granniss was in "no way influenced" by "the solicitations of the plaintiff," but "had, prior to such solicitations, placed the property for sale with defendant, or had fully determined so to do," the average intelligence would perceive that plaintiff had failed to sustain the burden resting on him "to show that the services performed by him secured to defendant the sale of the property of the Cullum estate." There was no error in refusing the requested instruction, because the substance of it was contained in the instructions that were given.

2. The remaining contention of appellant is: "The amount of the verdict shows that the jury have not founded their opinion on the only possible contract established by the evidence." While it was evidently the purpose of plaintiff to recover in the action one-half of the commissions obtained by defendant, the jury returned a verdict in his favor for an amount exactly equal to one-third of said commissions. This verdict was undoubtedly the result of the uncertainty in the evidence as to the periods covered by the several con-

tracts between plaintiff and defendant, one of which appears to have been for one-third and another for one-half of the commissions obtained by the defendant on sales brought to it by plaintiff. The evidence was not entirely free from doubt as to which of these arrangements was in force at the time plaintiff's cause of action accrued. The appellant, however, cannot be heard to complain, because the jury gave it the benefit of the doubt and based the verdict on the contract most to its advantage.

The judgment and order appealed from should be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 625. Department One.—October 27, 1900.]

CYRUS NEWLOVE et al., Respondents, v. W. R. POND et al., Appellants.

ACTION FOR CONVERSION—FINDING OF OWNERSHIP.—In an action for damages for the conversion of grain, a finding that on the first day of a certain month the plaintiffs were the owners of and entitled to the possession of the grain, and that "while the said grain was so the property of the plaintiffs" the defendants, between said date and the first day of the next month, wrongfully took said grain and converted it to their own use, sufficiently shows that at the time of the conversion the grain was the property of the plaintiff.

ID.—LEGAL PRESUMPTION—CONTINUANCE OF OWNERSHIP.—It is a legal presumption that the ownership specifically found on the day named, in the absence of any finding to the contrary, continued up to the time of the conversion.

ID.—LEASE FROM AGENT—TERMINATION OF AGENCY—NOTICE FROM OWNER—UNAUTHORIZED DELIVERY OF GRAIN AS RENTAL.—The right and obligation of tenants to deliver grain as rental to an agent of the plaintiff from whom the premises were leased, is terminated by a notice from the owners that the agency had ceased, and that the tenants were forbidden to deliver any grain as rental to such former

agent; and upon a subsequent delivery of part thereof to him, the tenants and the former agent are liable to the owners for a conversion of the grain so delivered.

APPEAL from a judgment of the Superior Court of Yolo County. Frank Moody, Judge presiding.

The facts are stated in the opinion of the court.

Seth Millington, for Appellants.

R. Clark, and Hudson Grant, for Respondents.

VAN DYKE, J.—This was an action for damages for the conversion of certain barley and wheat situated at the time of the alleged conversion on the plaintiff's ranch in Glenn county. In addition to the denials of the allegations of the complaint defendants Whyler Brothers set up specially that prior to July, 1896, they were lessees of the land, on which the grain was grown, from defendant Speck, as agent of the owners of the land, paying a portion of the crops as rent, and that the grain in question was delivered by them to Speck without notice that his agency had ceased. Judgment went for the plaintiffs, from which defendants appeal on the judgment-roll.

It is alleged on behalf of the appellants that although the court finds that plaintiffs were the owners of the wheat and barley in sacks on July 1, 1896, it does not find that they were such owners at the time of the alleged conversion.

The findings are that "on or about the first day of July, 1896, the plaintiffs were the owners and entitled to the possession of six hundred and eighty-one sacks of barley, averaging one hundred and ten pounds to the sack, aggregating seventy-four thousand nine hundred and ten pounds. That at said time all of said grain was situated upon plaintiff's ranch in Glenn county, state of California. That while the said grain was so the said property of the plaintiffs, and between the first day of July, 1896, and the first day of August, 1896, the defendants W. R. Pond and N. K. Speck wrongfully and without plaintiff's consent took and converted to their own use six hundred and thirteen sacks of said barley, worth, at the date of the conversion, fifty cents

per cental, amounting to three hundred and thirty-seven dollars and fifteen cents. That between the dates last aforesaid the defendants W. R. Pond and N. K. Speck and Whyler Brothers wrongfully and without plaintiffs' consent took and converted to their own use sixty-eight sacks of the said barley, worth at the date of the conversion, fifty cents per cental, amounting to thirty-seven dollars and forty cents, and the whole of said wheat, to wit, three hundred and twenty-five sacks, worth, at the date of conversion, eighty cents per cental, amounting to three hundred and fifty-one dollars."

Bearing upon the special defense set up by defendants Whyler Brothers, it is further found that "prior to the delivery of the six hundred and thirteen sacks of barley, above found to have been converted by defendants Pond and Speck, the defendants Whyler Brothers had no notice that their said rent was to be delivered to any other person than to said N. K. Speck, but before the delivery of the sixty-eight sacks of barley and three hundred and twenty-five sacks of wheat to said defendants Pond and Speck, they said Whyler Brothers were duly notified by plaintiff not to deliver the same, or any part thereof, to their codefendants, Pond and Speck, but in disregard of said notice they delivered said sixty-eight sacks of barley, worth as aforesaid thirty-seven dollars and forty cents, and the three hundred and twenty-five sacks of wheat, worth as aforesaid three hundred and fifty-one dollars, to the said Pond and Speck." We think it sufficiently appears from the findings that at the time of the conversion the grain was the property of the plaintiffs. It is found that the plaintiffs were the owners upon the first day of July, 1896, and that between that date and the first day of August, and "while the said grain was so the property of the plaintiffs," it was converted. It is a legal presumption, in the absence of any finding to the contrary, that the ownership continued up to the time of the conversion. (Code Civ. Proc., sec. 963, subd. 32.) Although there does not appear to be a finding in reference to the wheat, it seems to be admitted by the appellants' attorney that the findings as to the wheat are the same as those as to the barley, and the omission thereof may have occurred in the

printing. The contention that the obligation on the part of the defendants Whyler Brothers to deliver the grain to Speck was not terminated is answered by the finding that the rent was to be paid to Speck only as agent, and that the grain for which such defendants were held responsible was delivered after notice of the termination of the agency, and forbidding them to pay the same over to Speck.

Judgment affirmed.

Harrison, J., and Garoutte, J., concurred.

[Sac. No. 680. Department One.—October 29, 1900.]

R. A. CURTIN, Respondent, v. SALMON RIVER HYDRAULIC GOLD MINING AND DITCH COMPANY, Appellant.

CORPORATIONS—SPECIAL MEETING OF DIRECTORS—NOTICE—INVALID MEETING.—Where the by-laws of a corporation do not designate the person by whom notice of a special meeting of the board of directors is to be given, the requirements of section 320 of the Civil Code apply, and the notice must be given by the secretary; and the acts of a mere majority of the directors present at a special meeting, of which no such notice was given to the absentees, and the minutes of which were never subsequently ratified as required by the by-laws, are not valid acts of the corporation.

ID.—QUORUM—DIRECTOR INTERESTED IN TRANSACTION.—The provision of section 308 of the Civil Code, to the effect that a majority of the directors of a corporation is a sufficient number to form a board for the transaction of business, is to be construed in connection with the provision of section 305 of that code, to the effect that unless a quorum of the board is present and acting, no business performed or act done is valid as against the corporation; and each of these provisions is limited by the principle that a director shall not participate in any act in which his personal interest is antagonistic to that of the corporation.

ID.—MORTGAGE TO INTERESTED DIRECTOR.—A meeting of the directors of a corporation, at which there is a mere majority of the members of the board, cannot authorize the execution of the corporate note

and mortgage to one of the directors present, as security for a past indebtedness due to him from it. And it is immaterial whether the director personally interested did or did not vote for the resolution authorizing such action.

ID.—MINING CORPORATION—RATIFICATION OF INVALID MORTGAGE.—The stockholders of a mining corporation, organized under the laws of the state of California, have no power under the provisions of the act of April 23, 1880, to ratify an attempted mortgage of the mining property of the corporation, which is invalid by reason of a want of authorization of the board of directors.

APPEAL from a judgment of the Superior Court of Skis-kiiyou County and from an order denying a new trial. J. S. Beard, Judge.

The facts are stated in the opinion of the court.

J. P. O'Brien, for Appellant.

J. B. Curtin, for Respondent.

HARRISON, J.—This action was brought for the foreclosure of a mortgage upon certain mining property, executed to the plaintiff's assignor by the president and secretary of the defendant. The defendant denied its execution of the note and mortgage, and upon this issue the court found in favor of the plaintiff and rendered judgment accordingly. The defendant moved for a new trial upon the ground that the decision was not sustained by the evidence, and, this motion having been denied, has taken this appeal.

The defendant is a mining corporation organized under the laws of this state, having a capital stock of one hundred thousand shares, and is controlled and managed by a board of five directors. The promissory note and mortgage upon which the action was brought were executed to Thomas W. Wells, the assignor of the plaintiff, July 24, 1897. Wells had previously advanced moneys to the defendant, and had taken therefor its promissory note for five thousand dollars, all of which, together with eleven hundred and twenty-five dollars of interest thereon, was then unpaid, and he had also subsequent to the execution of said note, advanced to it the further sum of seven hundred and sixty dollars. The note and mortgage were executed in pursuance of the fol-

lowing resolution which had been adopted on the previous day at a special meeting of the board of directors, at which there were present only three of the directors, of whom Wells was one:

"Resolved, that this corporation will borrow from Thomas W. Wells the sum of nine thousand five hundred dollars and execute its promissory note therefor, and that the president and secretary of this corporation be and they are hereby authorized for and on behalf of this corporation to execute said promissory note, payable three months after date, and that said corporation secure the payment of its promissory note for the sum aforesaid by a mortgage on all the property owned by this corporation.

"The above loan is for the purpose of paying note and interest held by Thomas W. Wells, and for moneys advanced to protect overdrafts."

The first objection made by the appellant to the validity of the mortgage is that the meeting at which its execution was directed was a special meeting, and that the directors there present were not "duly assembled," and, therefore, could not perform any corporate act. Section 303 of the Civil Code, authorizes a corporation by its by-laws to provide for "the time, place, and manner of calling and conducting its meetings," and section 320 of the Civil Code provides that when no provision is made in the by-laws for the mode of calling special meetings "all meetings must be called by special notice, in writing, to be given to each director by the secretary on the order of the president, or, if there be none, on the order of two directors." It is provided in the by-laws of the defendant that "the president or two of the directors may call special meetings of the directors at any time, and notice shall be given of such called meeting by leaving a written or printed notice at the last known place of business or of residence of each director at least one day before the time of meeting. Such service of notice shall be entered on the minutes of the corporation, and the said minutes, upon being read and approved at a subsequent meeting of the board, shall be conclusive upon the question of service." This by-law embodies the provision of section 320 in so far as it designates the persons who are authorized to call a special

meeting, but as it does not designate the person by whom the notice is to be given, such notice must be given by the secretary as provided in the section. It was shown by the testimony of the secretary that no notice of the meeting was given to either of the two directors who were absent therefrom, and the minutes of the corporation contain no entry of the service of any notice of the meeting, nor were the minutes of that meeting ever approved at any subsequent meeting of the board of directors. Under well-settled rules it must be held that the directors present at that meeting could not perform any valid corporate act. (*Harding v. Vandewater*, 40 Cal. 77; *Thompson v. Williams*, 76 Cal. 153¹; *Smith v. Dorn*, 96 Cal. 73; *Pauly v. Pauly*, 107 Cal. 8.²)

The respondent does not, in his brief, present any argument in support of the regularity of this meeting, but contends that, notwithstanding this infirmity, the note and mortgage created an obligation on the defendant, by reason of having been authorized at a meeting at which a majority of the directors were present, and the subsequent ratification thereof by two-thirds of the stockholders.

The respondent relies upon the following provision of section 308 of the Civil Code: "A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act." Under his construction of this provision it is immaterial whether Wells abstained from voting, or even voted against the resolution. Such construction would, however, enable an interested director to accomplish by indirection what the policy of the law forbids him from doing. It does not appear, either from the minutes of the board or by any testimony in the case, whether Wells voted for the resolution or not. Although he was director of the corporation, yet he was disqualified from voting, or in any mode acting in his official capacity as a director, for the purpose of creating an obligation of the defendant in his own favor. (*Wickersham v. Crittenden*, 93 Cal. 17.) As was said in this case: "So strictly is this principle adhered to that no question is al-

¹ 9 Am. St. Rep. 187.

² 48 Am. St. Rep. 98.

lowed to be raised as to the fairness or unfairness of the contract so entered into"; and in *Shakespear v. Smith*, 77 Cal. 640,³ this court said: "In such cases the court will not pause to inquire whether a trustee has acted fairly or unfairly; being interested in the subject matter, he may not as a trustee deal with himself and thus be subjected to the temptation to advance his own interests."

The same rules which preclude an interested director from uniting with other directors in the creation of an obligation in favor of himself by his vote forbid him from uniting with them in creating such obligation by any act or exercise of his official position, and a meeting at which there is not a majority of the directors, exclusive of such interested director, is not a competent board for the transaction of any corporate business. Section 305 of the Civil Code declares: "unless a quorum is present *and acting*, no business performed or act done is valid as against the corporation." The above provision of section 308 must be read in connection with this provision of section 305, and both are limited by the principle that a director shall not participate in any act in which his personal interest is antagonistic to that of the corporation. By reason of the disqualification of Wells from taking any part in passing the resolution for executing the note and mortgage to himself, he could neither vote in favor of the resolution, nor by his presence help to create a quorum by which the other two directors could adopt it. For the purpose of any action upon this resolution he was as much a stranger to the board as if he had never been elected a director, and, although he may have been physically present in the room with the other two directors, he was not for that purpose a component part of the board, any more than would have been any other bystander, and there was not, therefore, a quorum of the board "present and acting" at the time the resolution was adopted.

In *Jones v. Morrison*, 31 Minn. 140, it was held that a director of a corporation "cannot properly act on or form part of a quorum to act" on a proposition to increase his compensation. In *Van Hook v. Somerville Mfg. Co.*, 5 N. J. Eq.

³ 11 Am. St. Rep. 327.

137, 169, the chancellor said that a member of a corporation contracting with it is regarded, as to that contract, as a stranger; and held that, as the corporation was managed by five directors, one director could not, with two others, constitute a board to vote a mortgage from the company to himself. This case was afterward reversed upon other grounds, but no dissent from this rule was expressed. In *Copeland v. Johnson Mfg. Co.*, 47 Hun. 235, where the corporation was governed by a board of five trustees, it was held that an agreement made by it in favor of its president, under the authority of a vote of himself and two other trustees, was invalid. Under a similar state of facts in *Butts v. Wood*, 37 N. Y. 317, the court held that the board as thus constituted had no authority to entertain a bill in favor of one of its members, or to do anything in relation to it; that the claimant was disqualified from acting because he could not deal with himself, "and without him there was no quorum of the directors and they had no authority to transact business." In *United States Ice Co. v. Reed*, 2 How. Pr. 253, the court said: "A trustee whose attendance is necessary to make a quorum cannot act upon a claim in his own favor to bind the corporation, and by his presence he thus acted." The reasoning of the court in its opinion in *Buell v. Buckingham*, 16 Iowa, 284,⁴ cited on behalf of the respondent, does not commend itself to our judgment. In New York it has been held that, where an interested director takes part in the passage of the resolution, the corporate act is vitiated whether his vote was essential to its adoption or not. (*Anderton v. Aronson*, 3 How. Pr. 216; *Ashley v. Kinnan*, 2 N. Y. Supp. 574; *Metropolitan Elevated Ry. Co. v. Manhattan Ry. Co.*, 14 Abb. N. C. 103.) A contrary rule seems to prevail in Missouri. (*Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79.) It is unnecessary, however, in this case to decide which of these rules is correct, inasmuch as, if Wells was not properly a member of the board at this meeting, there was no quorum to act upon the resolution.

After the president and secretary of the corporation had executed the note and mortgage an instrument was signed by the holders and owners of more than two-thirds of the capital stock of the defendant, by which they purported to

⁴ 85 Am. Dec. 516.

ratify and approve the said mortgage, and it is contended by the plaintiff that under the provisions of the act of April 23, 1880 (Stats. 1880, p. 131), the mortgage thereby became valid and binding upon the defendant.

Section 1 of that act is as follows. "It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain in any way any additional mining ground, unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation." This section does not confer upon the stockholders any power to mortgage the property of the corporation, or to authorize the directors to mortgage it, and it is a familiar rule that ratification cannot give effect to an unauthorized or invalid act, unless the person or body making the ratification could in the first instance have authorized the act. The corporate power and business of the corporation must be exercised by the board of directors (Civ. Code, sec. 305), and the stockholders cannot, by their own act, mortgage its property. (*Gashwiler v. Willis*, 33 Cal 11.⁵) Any mortgage, to be effective, must be made by the board of directors, but under the provisions of the above act of 1880 the consent of two-thirds of the stockholders is requisite to its validity. The stockholders are thus made a component part of the power to make a mortgage effective, but cannot, by any act of their own, make a mortgage, or validate one that has not been previously authorized and executed by the board of directors.

Whether the defendant would be estopped from contesting the claim of the plaintiff to recover the moneys advanced to it by him is not involved herein. The plaintiff seeks by this action the sale of the defendant's property in payment of the note held by him, but, unless the defendant has created a lien upon the property, the plaintiff cannot maintain the present action for compelling its sale.

The judgment and order denying a new trial are reversed.

Van Dyke, J., and Garoutte, J., concurred.

Hearing in Bank denied.

[Sac. No. 691. Department One.—October 29, 1900.]

MARY B. ODELL, Respondent, v. WILLIAM S. MOSS, by
JOHN C. THOMPSON, Guardian, Appellant.

QUIETING TITLE—INCOMPETENT DEFENDANT—DEED TO PLAINTIFF—

TRUST RELATION—FINDINGS AGAINST EVIDENCE.—In an action by a sister of a defendant adjudged incompetent, to quiet title derived from his deed to her findings that he was competent when he made the deed, that it was not procured by fraud or undue influence, and that plaintiff paid an adequate consideration therefor, are against evidence which shows that defendant's habits of intoxication had long before impaired his capacity to manage his property, that he reposed special confidence in his sister, that he made the deed to her without consideration, other than an expectation of support, that she declared that the property was to be managed by her for his benefit, and that for a long time she regarded herself and acted as his trustee of the property, to be accounted for with vouchers, until she finally repudiated the trust.

ID.—DEFINITE AGREEMENT FOR SUPPORT AS CONSIDERATION—FAILURE OF PROOF.—Evidence showing a mere expectation on the part of the brother that the sister was going to pay for his support the sum of seventy-five dollars per month, without any testimony of the plaintiff that there was such an agreement, and without the production of any written contract to that effect, does not establish such an agreement as a consideration for the deed.

ID.—BROTHER AND SISTER—FIDUCIARY RELATION—SPECIAL TRUST AND CONFIDENCE.—The mere relationship of brother and sister is not of itself fiduciary, but it is a material circumstance in determining whether, as matter of fact, a fiduciary relation existed between them, which is more easily superinduced by reason of the blood relationship; and where it appears that special trust and confidence is reposed by one of them in the other, the one who occupies the superior position has the duties and responsibilities of a trustee, with the attendant consequences of the trust relation.

ID.—DEED FROM BENEFICIARY TO TRUSTEE—WANT OF ADEQUATE CONSIDERATION—PRESUMPTION—CONSTRUCTIVE FRAUD—UNDUE INFLUENCE—BURDEN OF PROOF—FINDING AGAINST EVIDENCE.—A deed from a beneficiary to a trustee without adequate consideration is presumed invalid and constructively fraudulent, and to have been obtained by undue influence. The trustee has the burden of proving the contrary, and of showing a compliance on his part with every equitable prerequisite to the validity of the deed; and in the

absence of such proof, a finding that the deed was not obtained by fraud or undue influence is unsupported by the evidence.

Id.—STATUTE OF LIMITATIONS—PAROL CONTINUING TRUST NOT CONSTRUCTIVE—REPUDIATION—KNOWLEDGE OF BENEFICIARY.—A parol trust, voluntarily assumed, which, by the understanding of the parties, was to be a continuing one, is not merely constructive; and the statute of limitations does not begin to run in such case against the beneficiary until a repudiation of the trust by the trustee has been brought home to the knowledge of the beneficiary.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denyng a new trial. G. W. Nicol, Judge presiding.

The facts are stated in the opinion of the court.

J. G. Swinnerton, and Budd & Thompson, for Appellant.

Louttit & Middlecoff, for Respondent.

THE COURT.—Appeal from a judgment in favor of the plaintiff and from an order denying defendant's motion for new trial.

The suit was brought to quiet the plaintiff's title to certain lands, consisting of a tract called the "Lindstrom tract" and an undivided interest in another tract. The defendant is an incompetent, and appears by guardian. The complaint is in the usual form. The case set up in the answer and cross-complaint is in effect that plaintiff's title was derived from the defendant—who is her brother, and alleged to have been of feeble intellect—by deed of date September 27, 1889; and that the deed was obtained by fraud and undue influence; also that the deed was intended as a mortgage to secure anticipated expenditures by the plaintiff for the care and maintenance of the defendant. The defendant also pleaded as an estoppel the judgment in a partition suit in the same court, in which plaintiff and defendant were partes; by which the Lindstrom tract was allotted to the plaintiff "as the owner thereof in severalty, subject, however, to an undetermined interest therein of the defendant . . . Moss, such interest to be ascertained (thereafter) in some subsequent action or proceeding between" them.

The findings of the court were in favor of the plaintiff on

all the material issues; and especially, it was found, in effect, that the defendant was competent at the time of executing the deed; that the deed was not procured by fraud or undue influence; that it was not intended as a mortgage; and that the plaintiff "gave and paid an adequate consideration for said land"; and also that the cause of action set up in the cross-complaint was barred by numerous provisions of the statute of limitations.

The principal question involved is as to the sufficiency of the evidence to support these findings.

It is found by the court that at and prior to the execution of the deed in question the defendant was not technically incompetent (Code Civ. Proc., sec. 1767), and that he was sober and competent when he executed the deed. But it appears from the evidence that at the time of the execution of the deed he had long been addicted to habits of intoxication, and that his capacity of taking care of himself and his property had been more or less impaired.

The deed in question, executed November 27, 1889, was followed by another deed of date November 29, 1889, conveying to the plaintiff another tract of land. The land conveyed by the latter deed was of the value of eleven thousand six hundred dollars; the land in controversy of the value of from six thousand to ten thousand dollars. The deed of November 29th was accompanied by a written agreement to reconvey on the twenty-ninth day of November, 1894, if at that time the defendant should have repaid to plaintiff all taxes, assessments, and advances made by her, with interest at eight per cent per annum. On the same day with the first deed a power of attorney was also executed, which is important as fixing the date of certain declarations of the defendant as given by one of plaintiff's witnesses.

The power of attorney was acknowledged before one Fraser, a notary public, who was also president of the Farmers' and Merchants' Bank of Stockton, and the plaintiff's banker. Fraser testifies that when the defendant came in to acknowledge it he said "he had deeded or intended to deed his property to his sister and that she was going to maintain him, . . . that she was going to support him, and he was going

to convey his property." The same witness testifies, with reference to the agreement accompanying the deed of November 29th, that he understood from the defendant that Mrs. Tam (now Mrs. Odell) was to pay him seventy-five dollars per month, and that she instructed the bank to pay him, during her absence, that amount; and a voucher was introduced showing the payment of seventy-five dollars November 30, 1889.

Another witness (the half-sister of plaintiff and defendant) testifies that the plaintiff told her "she would take care of Billy [the defendant], and look after his property; keep it from falling into other people's hands; that she would allow nobody to steal it from him; that was at the time she took up the management of Billy's property. . . . She always said, always claimed that she had vouchers she could produce at any time as to the way she had managed his property."

It was on the affidavit of this witness that a guardian *ad litem* was appointed in the partition suit referred to in the pleadings and findings. In the affidavit it is stated in effect that the defendant was the owner of an undivided sixth interest in the Lindstrom tract, and that the said interest was held in trust for him by the plaintiff; and the trust is set up at length in the answer of the guardian *ad litem*. It appeared also from the testimony of several witnesses (including the judge who tried the case) that the plaintiff, when on the witness stand in that case, expressly declared that she held the interest in trust for the defendant; and the decree—which allotted to her the land subject to his claim—was entered on her consent.

There was no evidence, outside the recital in the deed, of any consideration paid for the deed, other than the expectation of support and care to be received by the defendant; and there was no evidence—other than the declarations of the defendant to the witness Fraser—of any agreement on the part of the plaintiff to that effect. The above is the effect of the material evidence in the case; nor was there any contradiction. The plaintiff herself did not testify in the case, nor was her failure to testify explained.

In determining the effect of this testimony, three points are to be considered, namely: the consideration for the deeds,

the relations of the parties toward each other, and the nature of the transaction generally.

1. The court finds that there was an adequate consideration for the deed, but the finding is not supported by the evidence, and must therefore be disregarded. The statement of the defendant to Fraser that "she [the plaintiff] was going to support him," and that (witness believed) "Mrs. Tam was to pay him seventy-five dollars per month," would, in any case, be very meager evidence of a contract, and in the absence of testimony from the plaintiff (the only living competent witness of the transaction), must be regarded as simply an expression of the defendant's expectations. (Code Civ. Proc., sec. 1963, subd. 6.) Nor is there any agreement on her part contained in the contract accompanying the deed of November 29th, where, if there were such an agreement, it would naturally be expressed. If there was such an agreement, it must have been in writing (Civ. Code, sec. 1624, subd. 1), and could be produced. (Code Civ. Proc., sec. 1963, subds. 5, 6.) The claim of the respondent that the killing of plaintiff's husband constituted the consideration cannot be entertained. It does not appear that there was any cause of action on that account in the plaintiff against the defendant; and if there were it was not considered in the transaction, and therefore could not have constituted the consideration.

2. The relationship of brother and sister is not in itself a fiduciary relation, but it is a material circumstance in considering the question whether, in fact, such a relation existed. "Blood relationship short of parent and child creates alone no technical confidential relation, but one may very easily—more easily than without it—be superinduced as a matter of fact; and then, it seems, the ordinary case arises, with its attendant duties in the person occupying the superior position, and the corresponding burden of proof." (Bigelow on Fraud, 365.) The evidence on this point, we think, clearly establishes the fiduciary relation. It is expressly found by the court that by reason of the relation existing between them, the defendant "reposed in plaintiff especial confidence and trust." The plaintiff herself declared to her sister that she would take care of the defendant and of his property, and this declaration was made at or

about the date of the transactions in question or before. The testimony of Mrs. Griffith (the sister) to this effect is confirmed by the failure of the plaintiff to deny it, or to testify with regard to it—a fact that must be regarded as one of the controlling factors in the case. (Code Civ. Proc., sec. 1963, subd. 6, cited above.) Her evidence is confirmed also by plaintiff's subsequent declaration that she kept and could produce vouchers to show how she managed his property; and her admissions in the partition suit that she held the property upon some trust for him; also by the agreement accompanying the deed of November 29th, which was executed only two days after the deed in controversy; and also by the declarations of the defendant made to Fraser, the plaintiff's witness. It must, therefore, be assumed as a fact in the case that the relation of trustee and beneficiary, within the definition of the code, existed between the parties (Civ. Code, sec. 2219), with its attendant consequences, as prescribed in section 2235 of the Civil Code, and as long established in equity jurisprudence. (Bigelow on Fraud, 261 et seq.; 2 Pomeroy's Equity Jurisprudence, sec. 956 et seq.; 1 Story's Equity Jurisprudence, secs. 307 et seq., 311, 321; *Ross v. Conway*, 92 Cal. 632; *Butler v. Hyland*, 89 Cal. 575, 581; *Brison v. Brison*, 75 Cal. 528¹; *White v. Warren*, 120 Cal. 324, 325.)

The case of *Dimond v. Sanderson*, 103 Cal. 97, commented upon in the case last cited, was decided on the peculiar features of the case presented. It is equally emphatic, however, in asserting the general principle, with relation to cases where there is no consideration or the transaction is unfair. It cannot be construed in any way as trenching upon the familiar principle long established in the law; which is "that while it is not impossible that a gift between persons in such relations may be valid, yet that all such transactions are constructively fraudulent, and are only to be upheld upon a showing of special circumstances." (*Brison v. Brison*, *supra*); or, as expressed by Pomeroy (2 Pomeroy's Equity Jurisprudence, sec. 956 et seq.), that "in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity and casts upon that party the burden of proving

¹ 7 Am. St. Rep. 189.

affirmatively its compliance with equitable requisites and of thereby overcoming the presumption"; which is but the rule prescribed by the Civil Code, section 2235. In this case there was no evidence showing or tending to show that the influence of the plaintiff over the defendant was not used to obtain the deed; and, in view of the nature of the transaction as disclosed by the evidence, the finding of the court to that effect must be regarded as unsupported by the evidence.

3. The conclusion thus reached by applying to the case the presumptions arising from the peculiar relations of the parties is confirmed by the evidence, which, independently of such presumptions, would lead us to the same conclusion. There was no consideration, or at least no adequate consideration, for the deeds, and from this alone the presumption of undue influence arises. The case is one of that class of bargains that are said to be "of such an unconscionable nature and of such gross inequality as naturally lead to the presumption of fraud, imposition, or undue influence; . . . such bargains as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other, being inequitable and unconscionable bargains." (1 Story's Equity Jurisprudence, sec. 244 et seq.) It does not follow, nor do we mean to assert, that there was originally any actual fraud or fraudulent design on the part of the plaintiff. It is more probable, and may indeed be regarded as established in the case, that she took the conveyances with the motives expressed by her to her sister—namely, to take care of her brother's property for him; and that she continued in good faith to regard herself as his trustee until some time subsequent to the partition suit. But the transaction was none the less constructively fraudulent, for the defendant was induced to part with his property for a consideration that was apparent only, consisting in an agreement that could not be enforced.

Under this view of the case it becomes unnecessary to consider the effect of the judgment in the partition suit as a technical estoppel.

The finding with reference to the statute of limitations cannot be sustained. The case is not one of a merely constructive trust, but there was a trust "voluntarily assumed,

and which, by the understanding of the parties to it, was to be a continuing one. The trustee . . . continued to hold according to the understanding, and never repudiated the relation"—at least until after the judgment in the partition suit, within four years of the beginning of the action. (*Butler v. Hyland, supra.*) The trust was indeed—as was the case in *Butler v. Hyland, supra*—not evidenced by writing, and was therefore not enforceable as an express trust by legal proceedings; but it existed and was valid so long as it continued to be observed by the trustee, and established between her and the defendant the relation of trustee and *cestui que trust*, within the meaning of the rule that the statute does not run until the repudiation of the trust by the trustee. Here there is no evidence of any repudiation of the trust until the service of the demand for a conveyance by the guardian *ad litem* shortly before the commencement of this suit; and indeed it affirmatively appears that about the time of the judgment in the partition case, and within four years of the commencement of the action, she expressly acknowledged the trust relation, at which time the defendant was an incompetent. It is, indeed, found by the court that from the time of the deed the plaintiff asserted title in herself, and it is in fact so alleged in the answer and cross-complaint. But to render a repudiation effectual to set the statute in motion, the knowledge of it must be brought home to the *cestui que trust*. (2 Perry on Trusts, sec. 864.)

The judgment and order appealed from are reversed and the cause remanded for a new trial.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[Sac. No. 607. In Bank.—October 29, 1900.]

In the Matter of the Estate of ELVINEIGH M. KENDRICK, Deceased. ELIZA MASTERSON et al., Contestants of Will, Appellants, v. JAMES SHELTON, Executor, Proponent, and JENNIE T. SHELTON, Devisee, Respondents.

WILL—CONTEST OF PROBATE—UN SOUND MIND OF TESTATOR—INSANE DELUSIONS—SHOWING REQUIRED.—In order to sustain a contest of the probate of a will for the unsoundness of the mind of the testator, by reason of insane delusions, it must be shown that the delusions were not merely temporary hallucinations, or unfounded dislikes or antipathies, or false opinions and beliefs, but were spontaneous and firmly fixed beliefs of a diseased mind, which no argument or evidence could convince to the contrary, and which a rational mind would not entertain, and also that the insane delusions operated to cause the production of the will under attack.

ID.—VERDICT AGAINST EVIDENCE.—The evidence reviewed, and held to be insufficient to sustain the verdict of the jury that at the time of the making of the will the testator lacked testamentary capacity by reason of unsoundness of mind. [McFarland, J., dissenting.]

ID.—UNDUE INFLUENCE—CHANGE OF WILL—SUPPORT OF VERDICT.—A verdict that the will was obtained by undue influence is supported by evidence showing that it was changed in favor of a niece who was well to do, from a previous will in favor of a sister who was poor and had a large family, and that the testatrix, after having suffered a paralytic stroke, sent for the niece to induce her to support the previous will, and to make her present in that view, and that the niece, after learning of the will, spoke against the sister to the testatrix, and had repeated and long conversations with her just before the will was changed, after which conversations the testatrix, while in an enfeebled condition, put herself in the hands of the niece to be controlled by her in the change of the will.

ID.—ISSUE OF FRAUD NOT SUBMITTED—MISLEADING INSTRUCTION.—Where the only issues submitted to the jury were insanity and undue influence, an instruction upon the question of fraud, which the court had refused to submit to the jury, was confusing and misleading.

ID.—ERRONEOUS INSTRUCTIONS—INSANE DELUSIONS—DEFINITION—CONSEQUENCES.—Instructions on the subject of insane delusions, which omit from the definition thereof the element that it must be ad-

hered to against reason and evidence, and which omit from the declared consequences thereof in vitiating the will the important qualification that the jury must find that the particular will in question was caused by, or was the product of, one or more insane delusions, are erroneous.

1D.—“INSANE PREJUDICE”—MISLEADING INSTRUCTION.—An instruction which predicates unsoundness of mind of the testatrix upon the possession of an “insane prejudice” which influenced her will in the disposition of her property, is confusing and misleading in not using the recognized term “insane delusion,” which has a well-defined and exact meaning.

1D.—UNDUE INFLUENCE—PROOF—DEFINITION—IMPROPER INSTRUCTION.—An instruction upon the subject of undue influence, which is argumentative and which purports to enumerate circumstances proving undue influence, which may merely tend to show undue influence, but which are in nowise conclusive thereof, and which declares it not possible with exactness to define or describe undue influence except in general and approximate terms, and seems to leave to the jury the determination as to what may constitute undue influence, is erroneous.

APPEAL from an order of the Superior Court of Glenn County denying a new trial. Frank Moody, Judge.

The facts are stated in the opinion of the court.

F. C. Lusk, and Seth Millington, for Appellants.

Cannon & Freeman, Charles L. Donohoe, and B. F. Geis, for Respondents.

HENSHAW, J.—There was offered for probate before the superior court of Glenn county an instrument asserted to be the last will and testament of Elvineigh M. Kendrick, deceased, executed upon April 16, 1894. Certain brothers, sisters, nephews, and nieces of the deceased contested the probate upon various grounds, and a trial was had before a jury, to which the court submitted two special issues: 1. Was the decedent, at the time she executed the will, of sound mind? 2. Was the decedent, at the time she executed the will, acting under undue influence exercised over her by James Shelton, Jennie T. Shelton, Zeller Shelton, and Dr. Cameron, or either of them? The jury returned verdicts in favor of the contestants upon both of these issues, and a judgment refusing probate to the will followed. The proponents of the will moved

for a new trial, and upon denial of their motion have appealed from the order.

Mrs. Kendrick was of French parentage, and one of a family of nine children, born in Missouri. She was a widow in 1853, in which year she came to California. In the following year she married James Kendrick, and with him lived in the northwestern part of Colusa county, now Glenn county, until he died in 1887. Some of her relatives, brothers and sisters, accompanied or followed her to California, and in particular a sister, Mrs. Masterson, who is prominent in this contest. Upon the death of her husband Mrs. Kendrick was left a childless widow, with a fortune in value from seventy-five thousand to one hundred thousand dollars. She was a woman of masculine temperament, and did a man's work upon the farm, drove teams, broke colts, and the like. She possessed other characteristics commonly recognized as masculine. In speech, when angry, she was violent, extravagant, and exceedingly profane. Yet, withal, she was a kindly woman of generous impulses, and bestowed her money freely upon her relatives. So liberal had she been with her gratuities and donations that at the time of her death, of the considerable fortune left her by her husband, with its increase, she had disposed of all but about fifteen thousand dollars. Only this amount is affected by the will. The sister, Mrs. Masterson, came to Colusa county in 1858, and has lived there near to Mrs. Kendrick ever since. Mrs. Masterson was poor, and had a large family. Both before and after Kendrick's death Mrs. Kendrick contributed largely to the support of Mrs. Masterson and her family, and aided her in rearing her children. The sisters were on terms of intimate friendship, but their intimacy was frequently interrupted by violent quarrels, lasting sometimes for months, during which they saw nothing of each other. Overtures to a reconciliation would then follow, their differences would be healed and then their friendship resumed. By the terms of the offered will the property of Mrs. Kendrick was devised and bequeathed to Mrs. Shelton. Mrs. Shelton was the daughter of a living brother of Mrs. Kendrick, and, therefore, not an heir at law. Mrs. Shelton, it is said, was by temperament and disposition very like her aunt, and was a favorite with her. Mr. Shelton was Mrs. Kendrick's business agent and trusted manager of her affairs.

Before her death Mrs. Kendrick had given to the Mastersons money and property to the amount of twenty-eight thousand dollars, and to the Sheltons as much or more. About the year 1890 Mrs. Kendrick was informed that she had Bright's disease, and that it was progressive and incurable.

In July, 1893, she made her will, leaving all of her property to her sister, Mrs. Masterson, the gift, however, being coupled with a request that out of the property she pay certain specified sums to named relatives and friends. On February 10, 1894, at her home in Orland, she was stricken with paralysis, which resulted in hemiplegia. Mrs. Masterson was with her and attendant upon her at the time of this attack. The Sheltons arrived soon after, and became aware for the first time of the existence of the will in Mrs. Masterson's favor. Differences arose between the two sisters, the nature of which will become a matter of future consideration. Mrs. Masterson left the house, and thereafter during Mrs. Kendrick's life had no further intercourse with her. Upon February 22, 1894, Mrs. Kendrick destroyed the will in Mrs. Masterson's favor, and made a new one giving all of her property to James Shelton, the husband of her niece. Afterward she was taken by the Sheltons to their home, where on the sixteenth day of April, 1894, she made a later will, the one here offered for probate, in which all of the property was left to Mrs. Shelton, whose husband was named as executor. She remained at the home of the Sheltons until her death in August, 1895.

1. The jury found that the deceased was incapable of making testamentary disposition of her property by reason of her unsoundness of mind. Mrs. Kendrick had suffered a stroke of paralysis affecting one-half of her body. There was a blood clot upon her brain. She was thus unquestionably enfeebled both mentally and physically. But the contention that her condition was one of dementia or insanity cannot for a moment be entertained. It appears almost without question that she conversed intelligently and well, and that she had an excellent knowledge of every-day affairs, of her property and interests. She certainly had a mind and memory competent to deal with and intelligently to dispose of her

property among the selected beneficiaries of her bounty. (*Greenwood v. Greenwood*, 3 Curt. 2.)

The stress of the argument upon this point is, however, devoted to the proposition that Mrs. Kendrick was a monomaniac, and the victim of insane delusions influencing the making of this will in favor of Mrs. Shelton and to the exclusion of the other relatives. So far as the relatives other than Mrs. Masterson are concerned, the consideration may be brief. She is not shown to have harbored any particular animosity against nor to have displayed any particular affection for them. No evidence is offered of any insane delusion touching them, or any of them, save Mrs. Masterson alone. As to her, the case presented by respondents is the following: After her stroke of paralysis the deceased gave evidence of a hostility against Mrs. Masterson as violent as it was groundless. She hoped Mrs. Masterson would rot off the face of the earth with her cancer. She would like to see her burning to death on a brush pile, and would never give her a drop of water to drink. The following is an enumeration of the insane delusions under which it is said Mrs. Kendrick was laboring from and after the time of her paralysis: 1. That there were lice upon her bedclothes and person, and that there was tallow in all of her food; 2. That Mrs. Masterson had stolen all her wearing apparel; 3. That Mrs. Masterson was or had been trying to put her out of the house that she occupied; and 4. That Mrs. Masterson had tried to kill her.

In considering these specifications it is important to bear in mind exactly what an insane delusion is, and what kind of an insane delusion will justify the refusal of probate to so solemn and important an instrument as a will. Prejudices, dislikes, and antipathies, however ill-founded, or however strongly entertained, cannot be classed as insane delusions, nor is every delusion an insane delusion. Whenever one's mind is tricked or deceived into a false opinion or belief, it has been played upon; it is deluded. But an insane delusion is the spontaneous production of a diseased mind leading to the belief in the existence of something which either does not exist or does not exist in the manner believed—a belief which a rational mind would not entertain, yet which is so firmly fixed that neither argument nor evidence can con-

vince to the contrary. Moreover such an insane delusion must have operated to cause the production of the will which is under attack. (*Estate of Carpenter*, 94 Cal. 406; *In re McDevitt*, 95 Cal. 33; *Cole's Will*, 49 Wis. 181; *Middleditch v. Williams*, 45 N. J. Eq. 734; *Stackhouse v. Horton*, 15 N. J. Eq. 228; 1 Redfield on Wills, 89; *Estate of Scott*, 128 Cal. 57.)

Considering the evidence in support of these alleged insane delusions in the light of the well-settled principle just enunciated, it appears that after her stroke of paralysis Mrs. Kendrick believed that she was infested with lice, and that tallow was placed in her food. These beliefs were unquestionably unfounded. They were held with a tenacity characteristic of an insane delusion. Neither argument nor evidence could convince her to the contrary. But at the same time they were not permanent, and passed away as the patient recovered from the shock of her attack. They seem rather to have been in the nature of the hallucinations which accompany the delirium of a fever patient. But, considering them as insane delusions, they were not insane delusions operating to produce the will in question. It does not appear that Mrs. Kendrick attributed the pest of the lice or the presence of the tallow to the machinations of Mrs. Masterson, or any other of the contestants. As to the second, by the testimony of two witnesses it is in evidence that Mrs. Kendrick lay naked in bed and accounted for her lack of wearing apparel by the charge that Mrs. Masterson had stolen her clothing. As against this there is the testimony of many people who came in contact with her, and by whom she was surrounded, to the effect that they never heard Mrs. Kendrick utter such a charge. Moreover, it does not appear that the sick woman was ever reasoned with upon the matter, or that any effort was made to convince her of the falsity of her belief. It does not appear how she acquired the belief. If she believed it upon the evidence of her senses, or upon the statements of some one in whom she had confidence, no matter how ill-founded her conviction might have been, it could not be placed in the category of insane delusions. The third alleged insane delusion is thus fairly explained by the evidence: Mrs. Kendrick had given to Mrs. Masterson a deed to the house

which the former was occupying, with the express understanding that it was not to be placed on record until after Mrs. Kendrick's death. Very soon after Mrs. Kendrick suffered the paralytic shock Mrs. Masterson caused the deed to be recorded. Mrs. Kendrick sent for the keys of the house; Mrs. Masterson had taken them. This seems to have been the source and origin of the final quarrel between the sisters. Mrs. Masterson explained to Mrs. Kendrick that she had no thought of ejecting her, and offered to return to her the recorded deed, but the passionate sick woman refused to accept the explanation and grew angry over Mrs. Masterson's violation of their understanding. The violated agreement, the recording of the deed, the detention of the keys, the locking of the chicken-house, the sale and removal of Mrs. Kendrick's lard, while not sufficient to justify the conclusion that Mrs. Masterson did intend to eject her invalid sister from the house, afforded some ground of belief to the sick and irascible woman that her sister designed to take advantage of her helplessness. And it being further considered that Mrs. Kendrick, when aroused, seems to have been both violent and extravagant of speech, the matter of the accusation does not appear extraordinary. At least the belief did not originate in a diseased mind, but found color for its support in the matters that have been recited. It cannot, then, be considered an insane delusion. The facts concerning the accusation that Mrs. Masterson had tried to kill her are these: Mrs. Kendrick had been taking morphine to relieve her pain. The doses and the times of their administration had been prescribed. Upon an occasion shortly after the paralysis Mrs. Masterson administered one dose, which, failing to relieve the patient, was followed by a second. When this was known Mrs. Masterson was expostulated with. It was told her that she might injure or kill the patient, to which she replied that it did her no harm. This event, like others in the case, is in dispute, but it does affirmatively appear that Mrs. Shelton related the matter to Mrs. Kendrick. When the testimony which bears upon this accusation by Mrs. Kendrick against Mrs. Masterson is analyzed, it will be found that it has reference to this occurrence, Mrs. Kendrick saying that Mrs. Masterson had tried to

kill her by poison, or had given her an overdose of morphine, and similar expressions. There was for this accusation the foundation which has been related. It was not the groundless and self-originating belief of a diseased mind. As to the extravagant form of the charge, allowance must be made for the temper and violence of the accuser. Finally, as to each and all of these alleged delusions, it does not appear that any of them were dominant ideas in the mind of Mrs. Kendrick. They were not always nor constantly referred to when Mrs. Masterson was under consideration, and very many witnesses never heard any such expressions from her. It is a characteristic of monomania and insane delusion that when the conversation turns upon the subject, the patient is dominated by it and cannot conceal his conviction. We conclude, therefore, that the finding of the jury that at the time of the making of the will Mrs. Kendrick lacked testamentary capacity by reason of unsoundness of mind is not supported by the evidence.

2. Upon the question of undue influence the following was made to appear: Some years before the date of these occurrences Mrs. Shelton had expressed her desire and intention of separating the two sisters and breaking up their intimacy. More than a year before Mrs. Kendrick suffered the paralytic shock her will had been executed in favor of Mrs. Masterson. Of this the Sheltons were in ignorance. They were informed of the fact shortly after Mrs. Kendrick was stricken. Mrs. Kendrick stated that she sent for the Sheltons after she was paralyzed to inform them of the will in Mrs. Masterson's favor, and to give them a three thousand dollar note so that they would not make Mrs. Masterson any trouble about the will. About ten days thereafter a new will was prepared leaving all of the property to Mr. Shelton. The Sheltons were well to do. Mrs. Masterson was poor. The will by which Mrs. Shelton took cannot be said to be an unnatural will in the legal sense, since if Mrs. Masterson was a favorite sister, Mrs. Shelton was a favorite niece, and no lineal descendants of Mrs. Kendrick were excluded; but, at the same time, the fact of the changed disposition of the property and the circumstances surrounding and attending the change are proper for consideration. Upon the night of February 22d Mrs. Shelton,

watching by the bedside of her aunt, held a long, earnest, whispered conversation with her. It lasted for hours. At the conclusion of this conversation Mrs. Shelton said: " 'Aunt Elvineigh, I will send for Mr. Shelton.' My Aunt replied: 'Do as you like, child.' " Mrs. Shelton then said: "Will I send now, or wait until morning?" Mrs. Kendrick said: "I don't care which." Mrs. Shelton said: "I will go call Mr. Prentiss now," and aunt said: "Do as you like, child." Thereupon Mrs. Shelton left the house, aroused Mr. Prentiss, and told him to go for her husband, that Mrs. Kendrick wanted to change her will. Later in the day the will in Mrs. Masterson's favor was burned, Mrs. Shelton placing it in the fire at her aunt's direction. Upon the same day Mr. Shelton arrived at the house with a lawyer, and the will was drawn in his favor. To a Mrs. Flood, and in the presence of Mrs. Shelton, Mrs. Kendrick stated, and of this Mrs. Shelton makes no denial, that "Mrs. Shelton told her Mrs. Masterson was trying to poison her, and that she didn't know it before that. . . . She said she had changed her mind about giving the property to the Mastersons after she heard that they had tried to poison her, and that was the reason she had changed her mind." It is conceded that the will offered in probate by which the property is left to Mrs. Shelton was made in effectuation of the same idea that existed when the will in favor of Mr. Shelton was prepared. If the one was the product of undue influence, so was the other. The presumption in favor of fair dealing always prevails, saving in those cases where the parties stand in the relation of legal confidence the one to the other. It is well settled that the naked facts that a will is in favor of one person, that that person had opportunity to coerce the mind of the testator, and that the evidence raises a suspicion that he did so, are not sufficient to justify the conclusion that undue influence was exercised. The evidence must amount to proof, and, as is said in *In re Langford*, 108 Cal. 608: "It has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator."

Upon the question of the sufficiency of this evidence to support the verdict that the will was procured by undue in-

fluence we confess a feeling of some doubt. The question is a close one. But considering that there is in evidence the expressed intent of Mrs. Shelton to separate and break up the intimacy between the two sisters, that the Sheltons knew nothing of the will in Mrs. Masterson's favor until Mrs. Kendrick had suffered her paralytic stroke, that Mrs. Kendrick declared that she had sent for them to urge them to uphold the will, that during the ten days that elapsed from the time of the shock to the making of the will in Shelton's favor differences had sprung up between the sisters, that Mrs. Shelton was in repeated whispered conversations with her sick aunt, that the long whispered conversation upon the night preceding the making of the new will manifestly bore upon the subject, that Mrs. Kendrick at the conclusion of that conversation seems to have put herself unreservedly in the hands of her niece and to have been dominated by her—these facts and circumstances, taken with the admittedly enfeebled mental and physical condition of the testatrix, we think must be held sufficient to justify the verdict of the jury.

Many of the instructions given by the court are criticised by appellant. Some of these demand consideration. Besides undue influence and mental incompetency the contestants charged fraud in the procurement of the will. The court refused to submit to the jury the issue of fraud, and must have done so under the conviction that the evidence was insufficient to warrant the submission of that ground of contest to the decision of the jury. The jury was asked to pass upon but two issues, mental incompetency and undue influence; yet, at the same time, when the court came to deliver its instructions it charged fully upon this question. If the charge of fraud was not sufficiently supported by the evidence to have warranted its submission to the jury, it was confusing and misleading for the court to instruct upon that question.

By instruction 14 the court charged as follows: "An insane delusion is the pertinacious belief of the existence of something which does not exist, and the acting upon that belief. Belief of things which are entirely without foundation in fact, and which no sane person would believe, is insane delusion. If a person be under a delusion, though there

be but partial insanity, yet if it be in relation to the act in question, it will defeat a will which is the direct offspring of that partial insanity."

This instruction is erroneous, and, as it was the only instruction in which the court attempted to define an insane delusion to the jury, it was clearly prejudicial to the appellant. It omits the essential element of an insane delusion—that it is created without reason or evidence and is adhered to against reason and evidence. It permits the confusion of a mistaken belief with an insane delusion. Support for this instruction is sought to be drawn by the respondents from the unreported case of *Clements v. McGinn* (Cal., Aug. 30, 1893,) 33 Pac. Rep. 920; but an inspection of the record in the McGinn cases discloses that the instruction here given is but a garbled extract from that delivered in the former case. The instruction in the McGinn case was as follows:

"Delusion of mind is to an extent insanity. The main character of insanity in a legal view is said to be the existence of a delusion—that is, that a person should pertinaciously believe something to exist which does not exist, and that he should act upon that belief. Belief of things which are entirely without foundation in fact, and of the existence of which the testator had no evidence and which no sane person would believe, is insane delusion; that is, when a person believes things to exist which exist only, or at the least in that degree only, in his own imagination, and of the nonexistence of which neither argument nor proof can convince him, that person is of unsound mind." It is readily seen that the definition thus given differs essentially from that which given to the jury in the case at bar.

Instruction 26 is also faulty. In this the jury was told that if they believed that the deceased "was at the time when said instrument was signed and attested laboring under any delusion regarding the contestants, or any of them, that she cannot be regarded as or accounted as mentally sane in making said alleged will so far as the contestants or any of them are concerned, though she might be mentally sane as to the rest of the world." In this the jury was instructed that if the deceased entertained any delusion regarding any of the contestants that she could not be regarded as men-

tally sane in making the will. If by delusion is here meant an insane delusion, still the instruction is a faulty presentation of the law. It is not any insane delusion regarding the contestants or any of them; it is only an insane delusion which operated to the injury of the contestants to produce the will in question, which would justify the jury in declaring that the will was the product of an unsound mind.

By instruction 27 the jury was told that if they were satisfied that the deceased, at the time of signing and attesting the will, conceived or believed that her sister, Eliza Masterson, had tried to kill her, etc., and that there was no foundation for any such belief, and that she was incapable of being permanently reasoned out of that belief, "then you will be warranted in concluding that said deceased was laboring under an insane delusion, and it will be your duty to find as your answer and verdict that at the time of the making of said will she was of unsound mind."

The vice of this instruction is apparent. It omits the important qualification that the jury must also find that the particular will in question was caused by or was the product of some one of these insane delusions; for, if the insane delusion did not influence the making of the will in question, it would matter not how many such the deceased might have entertained.

By instruction 35 the jury was told that if Mrs. Kendrick had "an insane prejudice respecting her sister, Eliza Masterson, or any other of the contestants, or either of them, which influenced her will in disposing of her property, thereby, and brought about the disposal of her property, which, if her mind had been entirely free from said insane prejudices, would not have been made, then your answer to issue one as to whether she was of sound mind at the time of making said will must be no." This sentence is a little confusing. It is not easy to pick out the antecedent nouns to the relative pronouns. But aside from this, it is unfortunate in importing into the law the novel phrase of "insane prejudice," to the end certainly of confusing if not misleading the jury. Insane delusion is a recognized term of well-defined and exact meaning. What insane prejudice may be, we confess our inability to understand. If it means

the same as insane delusion, no advantage can be discerned in displacing the older and approved phrase for this new and untried one. If it means something different from insane delusion, then the proposition which is declared is without legal approval or sanction.

Instruction 11 is objectionable for several reasons: 1. It is argumentative; 2. It pretends to define the circumstances which will prove the existence of undue influence, whereas the circumstances enumerated, though they might have a tendency to show undue influence, are in nowise conclusive upon the question. The language of the instruction in this regard is the following: "Very seldom does it occur that a direct act of influence is apparent. The existence of influence must generally be gathered from circumstances, such as whether she had formerly intended a different disposition of her property; whether she was surrounded by those who had an object to accomplish to the exclusion of others; whether she was of such weak mind as to be subject to influence; whether the paper offered was such a paper as would probably be urged upon her by the persons surrounding her; whether they were benefited thereby to the exclusion of formerly intended beneficiaries." Each and all of these circumstances might be proved to exist, and yet neither singly nor altogether would they be sufficient to establish that the will was the product of undue influence. They are but circumstances attendant upon and surrounding the matter proper for the consideration of the jury, and with all other circumstances in the case to be given such weight as the jury may deem them entitled to. They would not, as the court instructs the jury, establish the existence of undue influence. In concluding this same instruction the court said: "It is not possible to define or describe with exactness what influence amounts to undue influence in the sense of the law. This can only be done in general and approximate terms. In each case the decision must be arrived at by application of the general principles to the special facts and surroundings of the case." To the contrary, what constitutes undue influence is well understood, and upon the question the courts are all in accord. (*In re McDevitt, supra*; *Estate of Calkins*, 112 Cal. 296; *Chandler v. Jost*, 96 Ala. 596.) The danger which lurks in the para-

graph from the instruction last above quoted is that it seems to leave to the jury the determination, not alone as to whether undue influence has been shown, but as to what may constitute such influence.

For the foregoing reasons the order appealed from is reversed.

Harrison, J., Temple, J., Van Dyke, J., and Garoutte, J., concurred.

McFARLAND, J., dissenting.—I am unable to concur in the judgment. I am aware that verdicts upsetting wills have frequently no substantial foundation in the evidence, and result from notions which jurors have as to how the will before them ought to have been; and I have frequently concurred in judgments here setting aside such verdicts, and have, in my own opinions, often expressed my views on the subject to the point that verdicts and judgments against the validity of wills should not be upheld here unless based on substantial evidence establishing the very matters which, in law, make an asserted will invalid. But in the case at bar I am not prepared to say that the evidence did not warrant the jury in finding either that the testatrix was laboring under insane delusions which directly operated to cause the production of the will in question, or that she at the time of the execution of the will was acting under undue influence as alleged by the contestants. And while some of the instructions to the jury, considered separately, are subject to hostile criticism, still I think that all the instructions considered as a whole, gave the jury reasonably correct information on the difficult subjects of "insane delusions" and "undue influence," which have been greatly obscured by the vast amount of writing about them to be found in the law books; and I do not think that appellants were prejudiced by any part of the instructions which, considered independently of the others, might be held as not quite fully giving a legal definition. I think that the order appealed from should be affirmed.

Rehearing denied.

Beatty, C. J., dissented from the order denying a rehearing.

[S. F. No. 1678. Department One.—October 30, 1900.]

KATE PHELAN, Respondent, v. PATRICK QUINN, Appellant.

PRIVATE WAY—ACTION TO REMOVE GATE—FORMER JUDGMENT—ACTION TO ABATE PRIVATE NUISANCE.—A former judgment for the defendant in an action to abate as a private nuisance alleged to be specially injurious to the plaintiff a gate placed across a private road at its connection with the public highway, is a bar to another action by the same plaintiff against the same defendant to have it adjudged that plaintiff is entitled to the free use of the same private road, and that the gate be adjudged an obstruction, and that the defendant be compelled to remove it, and be restrained from placing or maintaining across said road a gate or other obstruction, where it appears that substantially the same issues were involved in both actions, and both depend upon the same evidence.

ID.—DEDICATION OF PRIVATE ROAD NOT INVOLVED—ABATEMENT OF NUISANCE IN PRIVATE WAY.—It was not necessary for the plaintiff, in order to maintain the former action, to prove that the private road had been dedicated to the public and had been used and accepted by the public as a highway, and that plaintiff was specially injured by the obstructions in a manner different from the public at large. A nuisance in a private way may be enjoined or abated under section 731 of the Code of Civil Procedure.

ID.—DISPUTE OF RIGHT TO MAINTAIN GATE.—Where the real contention in both actions related to the right of the defendant to maintain the gate in question, and did not relate to the character of the road in which it was maintained, and that contention was tried in both cases on the same facts and the same evidence, the judgment in the first case on that subject matter is conclusive in the second case.

ID.—NATURE OF ACTION—CHANGE OF NAME OF THING OBJECTED TO.—The nature of an action cannot be changed by changing the name of the thing objected to; and an action to abate a gate as a nuisance is of the same nature with an action to remove the same gate as an obstruction.

ID.—SUFFICIENCY OF WIDTH OF GATE—ISSUE NOT CONCLUDED—NEW TRIAL.—Where there has been no previous adjudication of the question whether the gate is wide enough for the convenient use of the plaintiff's property as farming land, and there was evidence that it may be made wider, and that it is not wide enough to admit a self-binder harvesting machine, though wide enough for ordinary travel, a new trial will be granted to determine the question whether a wider gate should be provided.

APPEAL from a judgment of the Superior Court of Humboldt County and from an order denying a new trial. G. W. Hunter, Judge.

The facts are stated in the opinion.

J. N. Gillett, for Appellant.

S. M. Buck, for Respondent.

CHIPMAN, C.—Action that plaintiff be adjudged entitled to the free use of a certain road; that the gate erected across the same by defendant be adjudged an obstruction, and that he be compelled to remove the same and be restrained from placing or maintaining across said road a gate or other obstruction; also for damages. Certain questions were submitted to a jury, the answers to which the court adopted as findings of fact and gave judgment for plaintiff. The court also found that the judgment pleaded by defendant was not a bar to the action. Defendant appeals from the judgment and from an order denying his motion for a new trial.

The evidence tended to show that in 1872 defendant purchased from Owen McNulty, plaintiff's father, one hundred and sixty acres of land which was situated between other land where McNulty resided and the public highway. A private road ran from McNulty's residence to the highway which was fenced on one side. When defendant purchased the land McNulty was maintaining a gate across the private road where it connected with the public highway, and defendant continued to maintain the gate and McNulty used it for five or six years thereafter. About 1878 or 1879, the defendant having constructed a fence on the unfenced side of the road, the gate fell into disuse and the road was open and so remained until in 1893 defendant placed another gate across this road at the point where the gate stood before, and this action was brought for its removal. In McNulty's deed of 1872 to defendant (which was a quitclaim) the gate was not mentioned, but the deed contained the following: "Excepting and reserving therefrom a right of way for a wagon road" (describing the strip of land constituting the way in question). In 1889 McNulty deeded to defendant by grant

the same property, which deed contained the following; "This indenture is made to fortify, and as additional warranty to, the title of the hereinbefore described property in the party of the second part hereto, descending from a certain quitclaim deed dated April 30, 1872, made and executed by the first party to the party of the second part."

On November 8, 1887, Owen McNulty conveyed certain of his land to plaintiff, access to which from the public highway was by the road in question, and the deed contained the following provision: "Also a full, equal, undivided one-half interest in and to what is known as the 'Quinn Lane' in the southwest quarter of section 36, T. 4 N., R. 2 W., all in Humboldt meridian."

1. Defendant's plea of former judgment in bar of the action must first be disposed of. On February 1, 1896, plaintiff began her action against defendant for the abatement of the obstruction in question as a nuisance. After a trial by jury a judgment for defendant that plaintiff take nothing by her action was entered January 18, 1897. On March 3, 1897, the present action was begun. In the first complaint plaintiff alleged ownership of certain land, describing it; that it was "connected with a certain road and highway," describing the land reserved by the McNulty deed, "leading from said plaintiff's dwelling-house and premises to the main highways traveled by the general public of Humboldt county"; that said road (referring to the road in question) "affords the only access to said main highways from plaintiff's said dwelling-house and premises and the obstruction of said road, as hereinafter set forth, is specially injurious to plaintiff"; alleges that plaintiff and her predecessors in interest have for a long time been accustomed to travel "along said highway to and from said main highways without hindrance and of right ought still to use said road and highway free from all obstruction"; that "on or about July, 1893, said defendant wrongfully, maliciously, and wantonly obstructed said road and highway by placing fences and gates thereon, whereby plaintiff's ingress and egress to and from said main highway of said county was and is obstructed and cut off, and said obstruction greatly

interferes with the comfortable enjoyment of plaintiff's said property *and is a private nuisance*"; alleges damages in one thousand dollars. The prayer was: 1. That said obstruction be adjudged a nuisance; 2. That it be adjudged that said nuisance is specially injurious to plaintiff; 3. That said nuisance be abated; 4. For damages in the sum of one thousand dollars; 5. For such other and further relief as may be just and equitable; 6. For costs.

The complaint in the present action is identical with that in the first, except the words above in italics are not found in the last complaint, and the latter, in the paragraph alleging the wrongful obstruction erected in 1893, concludes as follows: "And renders said road less convenient and beneficial than before and materially interferes with plaintiff's use and enjoyment thereof." The prayer of the present complaint is: 1. That it be adjudged that plaintiff "is entitled to the free use of said road"; 2. That "the gate so placed and maintained across said road be adjudged an obstruction to the practical use of said road by plaintiff"; 3. That defendant be compelled to remove said gate and enjoined from placing any gate or obstruction across said road; 4. For damages of one thousand dollars; 5. For such other and further relief, etc.; 6. For costs.

In the present case certain deeds were introduced by plaintiff showing her own and defendant's title from McNulty, the deeds containing the exceptions relied upon; these same deeds were also introduced in the former trial. In the present case the question was submitted to the jury whether Owen McNulty, at the time he sold to defendant, maintained a gate and fence across the private way at a point where it connects with the public highway, and whether there was an agreement when McNulty deeded to defendant that the private road should be fenced and the road kept open at the will of McNulty. Substantially the same issues were submitted to the jury at the first trial. In both cases the question was submitted whether the road was a private way. In both cases there was a general verdict in addition to the answers to the specific issues, and in both cases the court made findings of fact and conclusions of law, different judges, however, sitting at the respective trials. In the present case the court

found as conclusion of law that the gate complained of is an obstruction to the practical use of the road by plaintiff; in the first case the court found that defendant had erected the gate complained of, but that plaintiff "was not and is not specially injured, nor has or does she by reason thereof suffer any damages different in kind from those sustained by the public at large," nor was her property injured thereby.

Respondent correctly states the rule that in order to constitute matter *res judicata* there must be certain enumerated existing identities. Mr. Freeman is cited to the effect that a judgment is conclusive only upon the issues tendered by the plaintiff's complaint. (Freeman on Judgments, 4th ed., sec. 249; 2 Black on Judgments, secs. 731-33; *Lillis v. Emigrant Ditch Co.*, 95 Cal. 558; *Cromwell v. County of Sacramento*, 94 U. S. 353.) The test is also claimed to be: "Would the same evidence support and establish both the present and former action?" If so, it is conceded the former recovery would be a bar; if otherwise, it does not stand in the way of the second action. (Citing Freeman on Judgments, sec. 259; 2 Black on Judgments, sec. 726; *Taylor v. Castle*, 42 Cal. 367.)

It is now claimed by respondent as conclusive of the question that in the former action "it was necessary for plaintiff to prove that the private road had been dedicated to the public and had been used for five or more years as a public highway, and had been accepted by the public either by the proper authorities or by continuous use; and that plaintiff was specially injured by the obstructions in a manner different from the public at large." It is claimed that no such issues were here tendered and that no such evidence was admissible in the present action; and, therefore, there is no bar.

In the first, as in the second action, defendant claimed that the road in question was a private way, and that by the reservations in the deeds and by the acts of the parties his right to maintain the gate or obstruction in question was secured to him. Plaintiff's right to use this road was given by her deed which conveyed to her an undivided one-half interest in the "Quinn Lane."

The obstruction in question was a nuisance upon plaintiff's theory of the case, and she had an action in which it might

have been enjoined or abated, or both (Code Civ. Proc., sec. 731); and she had this right if the road was a private way. (*Hardin v. Sin Claire*, 115 Cal. 460.) In both actions the road in question, the obstruction complained of, and the parties to the action were the same. The purpose of both actions was to cause the removal of the obstruction, and if at the first trial plaintiff had prevailed she could have had precisely the same relief as was granted her in the second action, for she asked, in addition to the abatement of the nuisance, "for such other and further relief as may be just and equitable." In both cases the complaints were so drawn as to entitle her to full equitable relief, and both cases seem to have been tried by the court as in equity, although special issues were submitted to the jury. So far as we can see, the same evidence would support both actions. The complaint did not in either case allege a public or a private road, but simply a road to the unobstructed use of which plaintiff was entitled. It was no more necessary in the former action than in the present one to show a dedicated road as claimed by respondent. The parties were relying on their right to the use of this particular road as it had formerly been used by their grantor, and the real bone of contention was as to the right of appellant to maintain the gate in question, and not as to the character of the road whether public or private, and this particular issue, as to the right to maintain the gate, was tried in both cases.

The first action was to abate a particular thing as a nuisance; the second action was to cause the removal of the same thing as an obstruction, but the thing was as much a nuisance when called an obstruction as when called a nuisance; the nature of the action was not changed by changing the name of the thing objected to. (See *Woolverton v. Baker*, 98 Cal. 628; *Parnell v. Hahn*, 61 Cal. 131.) We think the judgment in the first action was a bar to the present one, and this view of the case renders it unnecessary to notice the other points made by appellant.

2. There was evidence tending to show that the strip of land reserved for a road is twenty feet wide, that the gate erected by defendant is twelve feet wide, and the rest of the space is closed by posts and boards nailed thereon, and to ad-

mit a self-binder harvest machine a post must be removed and the fence taken down, although it appeared that the gate was the ordinary width and would probably admit a harvester if on trucks. The court found that the gate was wide enough for ordinary travel, but "not for all purposes for which said road may be conveniently used."

It may be that a wider gate should be provided, and this question has not been heretofore determined. The land of plaintiff is farming land, and the gate in question may not be of sufficient width for the convenient use of her property. For the determination of this issue alone a new trial should be granted, and we so advise.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed, and a new trial ordered upon the issue alone as indicated in the opinion.

Harrison, J., Van Dyke, J., Garoutte, J.

Hearing in Bank denied.

[S. F. No. 1475. Department Two.—November 1, 1900.]

In the Matter of the Estate and Guardianship of FANNY MARIE CAMPBELL, a Minor. W. H. CAMPBELL, Appellant, v. JOHN WRIGHT, Respondent.

GUARDIAN AND WARD—RIGHT OF PARENT TO GUARDIANSHIP.—Under section 246 of the Civil Code, and sections 1747 and 1751 of the Code of Civil Procedure, the superior court has not unlimited discretion to appoint for a minor a guardian other than the father or mother if, in its opinion, the interests of the minor would be thereby subserved. Under such latter section, and under the general law the *prima facie* presumption is that the parent is competent, and the court is not authorized to appoint another as guardian unless it finds to the contrary.

ID.—FINDING OF INCOMPETENCY OF PARENT.—Upon a contest between the father and a maternal grandparent for the guardianship of a minor, an order appointing the grandparent as guardian is not

sustained by the findings, unless the court finds that the father is incompetent. A mere finding that the appointment of the grandparent is for the best interests of the minor, in respect to its temporal, mental, and moral welfare, is insufficient.

APPEAL from an order of the Superior Court of Santa Clara County appointing a guardian for a minor. M. H. Hyland, Judge.

The facts are stated in the opinion.

H. V. Morehouse, F. J. Hambly, and Terrill & Richardson, for Appellant.

Jackson Hatch, and J. E. O'Connor, for Respondent.

SMITH, C.—The appellant, who is the father of Fannie Marie Campbell, an infant of two years of age, applied to the lower court by petition to be appointed guardian of her person and estate, the last consisting of personal property of merely nominal value. The application was contested by the respondents, John and Mary Wright, the maternal grandparents of the minor, who made a counter application for the appointment of John Wright, the grandfather, who was accordingly appointed by the court. The appeal is from this order.

The petition—or as it is entitled, “answer”—of the respondents contains no allegation that the appellant was in any way unfit for the office of guardian. Nor is there anything in the findings (or indeed in the evidence) that can be regarded as tending to show such unfitness. But the petition of the respondents, in effect, alleges, and the court in its conclusions of law finds, that “it is for the best interests of the said minor child, in respect to its temporal, mental, and moral welfare, that . . . the custody of said minor child be awarded to said John Wright.”

The language of the court is taken from section 246 of the Civil Code, which was apparently construed as giving to the court the unlimited discretion to appoint for the minor a guardian other than the father, if in its opinion the interests of the minor would be thereby subserved. But in this the court, I think, misconstrued the extent of its discretion.

Under the general law, and independently of the provisions of the codes, the father has a natural right to the care and custody of his child (2 Kent's Commentaries, 205; Schouler on Domestic Relations, secs. 245-48); and this right is recognized by the provisions of our codes (Civ. Code, sec. 197; Code Civ. Proc., sec. 1751); which are to be regarded as but a re-expression of the principles of the common law governing the subject. (Civ. Code, sec. 5.) The father's right, at least so far as the services of the child are concerned, is strictly a property right, for the loss of which—as in the case of servants generally—an action could at common law be maintained; and in other respects the right, though not commonly spoken of as such, is of essentially the same nature as the right of property. For though the subject of the right is not salable, it is valuable, and of all species of property the most valuable to the parent. Hence it is a mistake to suppose that the right of the father is merely fiduciary. It is that; but it is also—like the right of the child in the father—a right vested in him for his own benefit, and of which it would be a personal injury to deprive him. The right must therefore be regarded as coming within the reason, if not within the strict letter, of the constitutional provisions for the protection of property. (Beatty, C. J., in *Ex parte Miller*, 109 Cal. 662.)

The father's right is, however, coupled with the obligation to support and educate the child (Civ. Code, sec. 196), and is also qualified and strictly limited by the fact that the child itself is a human being, and as such vested with rights for which it is entitled to protection. Hence it is the clear right and duty of the state, to the extent the protection of the child may require, to control and limit, and under certain circumstances to terminate, the right of the father. Accordingly, independently of numerous statutory enactments, courts of equity have always, by the appointment of guardians and otherwise, exercised a liberal jurisdiction over the persons and estates of minors; and this jurisdiction may be said to be limited only by the principle on which it rests—namely, the necessity of protecting the rights of the child.

But the question here does not relate to the general right of the state, as exercised by the English court of chancery or courts of equity in this country, but to the special powers conferred by the codes on the superior court for the appointment of guardians. These do not purport to confer upon the superior court, acting in the special proceeding, all the powers hitherto exercised by courts of equity, but only the power to appoint guardians in certain cases (Code Civ. Proc., sec. 1747), and under certain conditions (Code Civ. Proc., sec. 1751); and the case is therefore to be determined by these provisions. By the former section the power of the court to appoint guardians is limited to the case "of minors who have no guardian legally appointed by will or deed"; and the same limitation is prescribed by section 243 of the Civil Code, and section 241 therein cited. In the latter section the power of the parent to dispose of the custody of the child by will or deed is expressly recognized; and this must be taken as a recognition of the general right of the parent to dispose of the custody of the child, of which it is but a special example. For it would be unreasonable to suppose that the legislature intended to limit or restrict a right, universally recognized in our own and all systems of law, to the single case provided for; which must therefore be regarded simply as an application of the recognized principle.

Accordingly, by the provisions of section 1751 of the Code of Civil Procedure, it is made the duty of the court to appoint the father or mother of the minor, "if found by the court competent to discharge the duties of guardianship." But under this provision, and under the general law, the *prima facie* presumption is that the parent is competent; and hence the court is not authorized to appoint another as guardian, unless it finds to the contrary. Hence the section is to be construed as if it read that the father or mother is to be appointed "if not found by the court incompetent," etc. The fact of the competency or incompetency of the father was, therefore, the controlling question in this case; and as there is no finding on the point, the findings must be regarded as insufficient to support the order appealed from.

The point is also made by the counsel for the appellant that the petition of the respondents was insufficient to confer jurisdiction on the court. Whether this is the case, or the same rule is to be applied as to the case of an insufficient complaint in an ordinary action, is an interesting question. A petition is necessary in order to confer jurisdiction on the court, as was held in *Ex parte Miller, supra*; but whether a petition that fails to set forth the jurisdictional facts will be sufficient is not there determined, and need not be determined on this appeal.

I advise that the order appealed from be reversed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed.

Temple, J., Henshaw, J., McFarland, J.

[S. F. No. 1705. Department Two.—November 1, 1900.]

M. BLUMENTHAL, Respondent, v. CHARLES GREENBERG et al., Defendants. CHARLES GREENBERG, Appellant.

SALE—DELIVERY TO PARTNER.—Under a contract for the sale of personal property to the vendees as partners, a delivery to one of the partners is a delivery to both.

ID.—EVIDENCE OF PARTNERSHIP.—In an action to recover the purchase price of property so sold and delivered, parol evidence is admissible that at the time of the sale the vendees stated, in the presence of the vendor and of each other, that they were partners.

ID.—REPRESENTATION AS TO VALUE—FRAUD.—The mere representation by the vendor that the property sold was worth a sum largely in excess of its actual value is not such a fraudulent misrepresentation as will warrant the annulment of the contract, if the vendee had a full and complete opportunity to inform himself as to its value, and inspected the property on several occasions before the purchase.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion.

A. Morgenthal, for Appellant.

Percy V. Long, and Harris & Hess, for Respondent.

COOPER, C.—This action was brought to recover of defendants a balance of eight hundred and ten dollars alleged to be due for goods, wares, and merchandise sold and delivered by plaintiff to defendants at their instance and request for the agreed price of eight hundred and fifty dollars. The case was tried before the court, findings filed, and judgment entered in favor of plaintiff for the sum of four hundred and five dollars and costs. This appeal is by defendant Greenberg from the judgment and from an order denying his motion for a new trial. It is claimed that certain of the findings are not supported by the evidence, and that the court erred in overruling two objections made by appellant to certain questions asked of the plaintiff while on the stand as a witness.

The court found that the plaintiff sold and delivered to the defendants goods, wares, and merchandise, and this finding is attacked, and in his specifications counsel says: "There is no evidence whatsoever that plaintiff at any time or place delivered any goods or any merchandise or any wares to defendant, Charles Greenberg." The evidence shows that the subject of sale was a saloon and the liquors therein, at 212 O'Farrell street in the city of San Francisco. That a contract in writing was made by plaintiff with both defendants for the sale of the property. Plaintiff testified: "Under that contract I delivered the place to Mr. Wehr, in the absence of Mr. Greenberg, on February 5th, which he directed me to do. . . . Wehr immediately took possession of the place." The plaintiff further testified that appellant said, "If I should not be here, deliver the place over to Wehr."

The witness Harris testified: "He [speaking of plaintiff] told Mr. Wehr that he gave him possession of the place in the name of both Mr. Wehr and Mr. Greenberg, and Mr. Wehr then went behind the counter and invited us to drink." The defendant Wehr testified that after the contract was made with plaintiff on January 31st, that appellant Greenberg told him that he had to go to Vacaville to settle up his affairs, and that he would be back by February 3d, and that Greenberg said: "If I ain't here you go right ahead."

The defendant Wehr, after further testifying that appellant had not returned on the 5th, said: "I took possession and re-engaged the men that were there on account they were acquainted with the people."

The above evidence amply sustains the finding. It is next argued that the finding that the defendants promised to pay plaintiff eight hundred and fifty dollars for the sale and delivery of the saloon to them is not sustained by the evidence. The written contract that was signed by both defendants was introduced in evidence by plaintiff without objection. It reads as follows:

"San Francisco, 1-31-96.

"We hereby bind ourselves and acknowledge the purchase of the saloon, No. 212 O'Farrell street, for the sum of \$850, from M. Blumenthal & Co.; we have given said M. Blumenthal & Co. \$40 as a deposit on said purchase, balance of purchase money to be paid by February 5, 1896.

"CHARLES GREENBERG.

"CHARLES J. WEHR.

"Witness: P. N. Feldtman."

This was not only the written agreement, but the agreement as testified to by plaintiff and defendant Wehr. Appellant, in his own testimony, says he was to purchase the property with defendant Wehr for eight hundred and fifty dollars, and "I was to pay one-half and Mr. Wehr the other half." The court found "that all the denials and all the allegations in defendant Greenberg's answer are untrue," and the appellant specifies with much particularity many things in the answer which he says the evidence shows to be true. These matters so specified are so wholly immaterial that it

would serve no useful purpose to discuss them in detail. An example or two will suffice. Appellant's counsel says: "The allegation in said answer 'that appellant is and always has been a blacksmith by trade' is true. . . . The allegation in said answer 'that appellant would notify his employer at Vacaville' is true. . . . The allegation in said answer 'that said employer owed appellant several hundred dollars for wages' is true." The fact that appellant is a blacksmith by trade, that he had several hundred dollars due him from his employer in Vacaville, while probably of interest to himself, has nothing to do with the merits of the case. Counsel should never take up the time of this court in arguing the question of the insufficiency of the evidence to sustain any finding of fact that is wholly immaterial. If a finding is material, and counsel in good faith believes the evidence insufficient to sustain it and points out its materiality and the respects wherein it is claimed that the evidence is insufficient, we will always carefully examine it; but counsel should not devote any portion of the record or briefs to the alleged insufficiency of evidence as to wholly immaterial findings. As to the portions of the answer which were material, it is sufficient to say the evidence shows it to be untrue. It denied the sale, the delivery, the price agreed upon, or that anything was due. The findings of the court heretofore discussed show that these denials were not true.

The remaining portions of the answer consisted of statements and matters wholly outside the issues, except the attempt to state fraud by plaintiff in stating the value of the saloon to be eight hundred and fifty dollars, and that appellant relied upon such statements, and that the saloon was worth only one hundred and fifty dollars. It is sufficient to state that the evidence does not support this part of the answer. Appellant went with Wehr several times and examined the saloon before he agreed to purchase it. After agreeing upon the price he says he would have paid all his portion down if he had had the money.

It may be, and probably is, true that appellant made a bad bargain and agreed to pay more for the property than it was

worth. But he should have considered all those things before he signed the contract. In cases of fraud and misrepresentation, when the parties are not upon an equal footing, and where an actual false representation has been made upon which the innocent party relied and upon which he had the right to rely, the courts will afford relief. But when a party makes a bad bargain with his eyes open or buys property for which he has no use, and concerning which he does not attempt to inform himself, the good of society and the well-being of communities will be much better subserved by leaving him "to repent at leisure." If the courts should attempt to act as guardians for all parties whose ignorance has caused them to be duped and to make bad bargains, it would be necessary to largely increase the judicial force now provided, and it would make all transactions uncertain and destroy trade and commerce.

After the plaintiff had testified as to making the sale to defendants and the contract of sale, he was asked: "Did they say what relation they bore toward each other, if any?" The appellant's objection to this question was overruled, and plaintiff answered that they said they "are partners together." The question was proper. Appellant was contending, and now contends, that a delivery to defendant Wehr was not a delivery to him. If the defendant Wehr was stated to be a partner in the presence of or by appellant, it was material, for the reason that a delivery to one partner was a delivery to both. Plaintiff was allowed, under appellant's objection, to state how the delivery was made. As appellant claimed there was no delivery, it certainly was competent to show the acts done by which plaintiff claimed that the property was delivered.

There is no merit in the other alleged errors, and it would be useless to discuss them.

The judgment and order should be affirmed.

Haynes, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Henshaw, J., Temple, J., McFarland, J.

[S. F. No. 984. Department Two.—November 1, 1900.]

J. C. GALINDO, Respondent, v. PATRICK ROACH, Appellant.

COSTS—AMENDMENT OF MEMORANDUM.—After the expiration of the time limited by section 1033 of the Code of Civil Procedure for serving and filing a memorandum of costs, an amendment of such memorandum cannot be had so as to insert additional items of disbursement, nor can a judgment for such additional items be rendered, in the absence of a showing that the omission was excusable on some of the grounds mentioned in section 473 of that code.

ID.—INSURANCE ON ATTACHED PROPERTY.—Expenditures made by a sheriff for fire insurance premiums on property attached are not proper items of costs.

APPEAL from a judgment of the Superior Court of Contra Costa County, from an order allowing an amendment of a cost-bill, and from an order taxing costs. Joseph P. Jones, Judge.

The facts are stated in the opinion.

R. H. Latimer, for Appellant.

C. Y. Brown, for Respondent.

GRAY, C.—This action was brought to recover money due for rent under the terms of a lease. A verdict was returned and a judgment was entered in plaintiff's favor for five hundred dollars and costs on the twenty-first day of January, 1897. A cost-bill was filed by plaintiff on the twenty-fifth day of the same month, claiming costs in an aggregate amount of four hundred and eleven dollars and thirty-nine cents. On the twentieth day of February, 1897, defendant's motion to tax costs came regularly on for hearing, and after the taking of some testimony was continued to the 24th of the same month, on which last date, after taking further testimony, it was continued to the following day, the 25th. On said twenty-fifth day of February, 1897, the plaintiff moved the court to be permitted to file an amendment to his memorandum of costs and disbursements, and against the objection

and exception of defendant the court made an order permitting the plaintiff to file an amendment to the cost-bill consisting of a single item as follows: "Sheriff's fees, digging and shipping beets to sugar factory, two hundred and forty-four dollars and five cents." This amendment was duly verified. After taking some further testimony the court made an order taxing the costs at six hundred and sixty-five dollars and forty-four cents, which sum is the total of the amounts claimed in both the original cost-bill and the amendment thereto. The costs, as taxed, are included in the judgment. The defendant appeals from the judgment, from the order allowing the amendment of the cost-bill, and from the order taxing costs.

The plaintiff was entitled to recover his costs, but to do so it was incumbent upon him to comply with the statute and claim his costs by delivering to the clerk and serving a memorandum thereof within five days after the verdict or notice of decision of the court. (Code Civ. Proc., sec. 1033.) "And a failure to claim such costs, or any item thereof, in the manner required by the statute is deemed to be a waiver of such costs, and precludes a recovery thereof." (*Hotchkiss v. Smith*, 108 Cal. 285; *Chapin v. Broder*, 16 Cal. 403.) "The omission from section 1033 of the Code of Civil Procedure of the clause in section 510 of the practice act, which provided that a failure by the prevailing party to file his memorandum of costs within the time limited should be deemed a waiver of his costs, is not a material circumstance. The code contemplates that such shall be the result, since the only costs which the clerk is authorized to insert are those claimed and taxed or ascertained, in the manner provided." (*Riddell v. Harrell*, 71 Cal. 254, 261; Code Civ. Proc., sec. 1035.)

Plaintiff made no showing for relief under the provisions of section 473 of the Code of Civil Procedure, and whether or not he is entitled to invoke that section at all in a case of this kind, it is clear that he cannot do so without a showing that his failure to claim the item of two hundred and forty-four dollars and five cents within the time allowed by law was ex-

cusable on some ground mentioned in said section. (*Dow v. Ross*, 90 Cal. 562.)

The items of twenty-five dollars and eighty cents paid by the sheriff to have the hay attached by him insured, and the one dollar and thirty cents interest thereon, were not proper items of costs, and should not have been allowed by the court. As to the other costs contained in the original memorandum filed, there was evidence in support of the items contested warranting the court in ordering them taxed as costs in the case.

The order permitting the filing of the amendment to the memorandum of costs should be reversed, the order taxing costs should be modified by reducing the amount of the costs to three hundred and eighty-four dollars and twenty-nine cents, the judgment should be modified to correspond therewith, and as thus modified the judgment and order taxing costs should stand affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order permitting the filing of the amendment to the memorandum of costs is reversed, the order taxing costs is modified by reducing the amount of the costs to three hundred and eighty-four dollars and twenty-nine cents, the judgment is modified to correspond therewith, and as thus modified the judgment and order taxing costs are affirmed.

Temple, J., Henshaw, J., McFarland, J.

[S. F. No. 1457. Department Two.—November 1, 1900.]

PETER J. FREIERMUTH, Appellant, v. WINIFRED
STEIGLEMAN, Respondent.

HOMESTEAD—MORTGAGE BY WIFE TO HUSBAND—ESTOPPEL.—Under sections 1242 and 1243 of the Civil Code, community property on which a homestead has been declared cannot be mortgaged by the wife to her husband, to secure an indebtedness from her to him, by a mortgage in which she alone joins. Such a mortgage is void, even in the hands of an assignee, and the wife is not estopped to deny its invalidity.

APPEAL from a judgment of the Superior Court of Santa Cruz County and from an order denying a new trial. Lucas F. Smith, Judge.

The facts are stated in the opinion.

Julius Lee, and Frank J. Murphy, for Appellant.

Charles B. Younger, and Lindsay & Cassin, for Respondent.

CHIPMAN, C.—Foreclosure. The court found on sufficient evidence that defendant and one Jacob Steigleman, for many years prior to April 25, 1876, and thenceforward were, and now are, husband and wife; that on July 9, 1892, defendant made and delivered her promissory note to her husband, and to secure the same executed at the same time a mortgage on certain four separate tracts of land; that long prior thereto, to wit, on April 25, 1876, defendant in due form of law executed and recorded her declaration of homestead on the first three of the tracts embraced in the mortgage, and that they were the community property of the husband and wife; that defendant's husband did not join in making this mortgage or the note; that on December 10, 1892, Jacob assigned the note and mortgage to plaintiff. The court made a decree foreclosing the mortgage as to the fourth tract, but found that plaintiff was not entitled to a decree of

foreclosure as to the first three tracts. The appeal is from the judgment and from an order denying plaintiff's motion for a new trial.

The sole question presented is, Did the mortgage convey these homesteaded lands as security for the note?

Section 158 of the Civil Code provides that: "Either husband or wife may enter into any engagement or transaction with the other . . . which either might do if unmarried," etc. Undoubtedly, the wife may ordinarily mortgage her separate property to her husband.

It has been held that although the wife cannot create a lien on the community property by mortgage, yet the mortgage is not void in the extreme sense; and if the husband afterward dies and the wife inherits the property, the mortgage becomes a lien on the interest thus inherited by the wife, subject to the payment of the debts of the estate. (*Parry v. Kelley*, 52 Cal. 334.) But we have no such case here. Where the community property is impressed with the character of the homestead, it cannot be conveyed or encumbered unless the instrument by which this is attempted to be done is executed by both husband and wife (Civ. Code, sec. 1242); nor can the homestead be abandoned except by a declaration of abandonment or grant thereof, "executed and acknowledged by the husband and wife, if the claimant is married." (Civ. Code, sec. 1243; *Gleason v. Spray*, 81 Cal. 217; *Beaton v. Reid*, 111 Cal. 484; *In re Lamb*, 95 Cal. 397; *Security Loan etc. Co. v. Kauffman*, 108 Cal. 214; *Merced Bank v. Rosenthal*, 99 Cal. 39.) Appellant does not dispute the correctness of the construction placed upon the statute by these cases, but he claims that they all relate to conveyances to third persons, and are not in point because this was the case of the wife conveying to her husband. He invokes the maxim of the common law found in section 3532 of the Civil Code: "The law neither does nor requires idle acts." *Burkett v. Burkett*, 78 Cal. 310,¹ is cited, where the court held that: "A husband can make a valid conveyance to his wife of his separate real estate, upon which he has declared a homestead which is still subsisting at the time of the conveyance, and he cannot avoid the

¹ 12 Am. St. Rep. 58.

same upon the ground that such conveyance was without the signature and acknowledgment of the wife." The question here is not whether the wife has an interest in the property which she may convey to her husband, leaving the property impressed with the homestead, as was the fact in the Burkett case, but the contention is that she may mortgage the homestead, as such, to her husband without his joining, because it would be an idle and foolish thing for him to mortgage to himself, and hence unnecessary to its validity. But where there is a homestead declared on the community property, as in this case, the law says that the homestead can neither be abandoned nor encumbered nor conveyed, except both the husband and wife execute and acknowledge the instrument by which such alienation or disposition is sought to be accomplished. It is not a question whether the law is to be held to require a vain thing. The law forbids the transfer of the homestead to anyone—to the husband or any other person—except it be done as prescribed by statute. The purpose of the law is to place it beyond the power of either spouse, acting alone, to destroy the homestead character impressed upon the real estate or encumber it in any way. It cannot be said that the law was substantially complied with, or that the husband was relieved from the necessity of signing the mortgage in the present case because he was the mortgagee, for that would still violate the express requirement of the statute. It simply results that the homestead declared on community property cannot be mortgaged by the wife to her husband: 1. Because she cannot alone mortgage it to him or anybody else; and 2. Because the husband cannot mortgage to himself, and therefore his signing the mortgage would not make it any the less illegal. Besides, we can see no good reason for giving the construction contended for. Why should the wife be permitted to mortgage the homestead to the husband to secure money loaned her by him? The maxim of the law relied upon is interposed to supply the want of execution of the mortgage by the husband. But as the husband could not mortgage to himself, how can we make this

maxim accomplish more than the husband could have done by signing the mortgage? It is beyond dispute that the wife alone could not have mortgaged to the plaintiff in this case (assignee of her husband). Why should we put a construction on the statute that would make an exception where she mortgaged to her husband? It would impair the homestead just the same in both cases, and in the latter case would result in giving the husband an interest in it greater than the wife, and would make it possible for him to acquire the entire interest by foreclosure. Construing the statute strictly, the mortgage was clearly invalid, and to give the statute the very free construction contended for would, we think, do violence to the spirit of the law as well as to its letter.

2. It is contended that the wife is estopped from denying the validity of the mortgage. (Citing *Tartar v. Hall*, 3 Cal. 263; *Dolbeer v. Livingston*, 100 Cal. 617.) There is no estoppel here; the mortgage was absolutely void. Plaintiff was not misled, for he had constructive, if not actual, notice of the homestead, and like notice also that the mortgage was executed by the wife alone, and he is presumed to have known that the law forbade the making of the mortgage in this manner.

The judgment and order should be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons giving in the foregoing opinion the judgment and order are affirmed.

Temple, J., Henshaw, J., McFarland, J.

[S. F. No. 1464. Department One.—November 2, 1900.]

HANS FRAHM et al., Appellants, v. MARTIN C. WALTON et al., Respondents.

INJUNCTION—MOTION TO DISSOLVE—DISMISSAL OF SUIT—LIABILITY OF SURETIES—COUNSEL FEES.—The voluntary dismissal of an injunction suit by the plaintiff, pending a motion to dissolve the injunction is equivalent to a final determination that the injunction was improperly granted as respects the liability of the sureties on the undertaking to respond in damages for counsel fees paid by the defendant to his attorney for making the motion to dissolve the injunction.

ID.—TIME OF PAYMENT OF COUNSEL FEES.—Whether the counsel fees were paid in advance of the services, or were not paid until after the action was dismissed, is immaterial.

ID.—ACTION ON INJUNCTION BOND—FEES PAID TO DISSOLVE INJUNCTION—FINDING AGAINST EVIDENCE.—In the action on the injunction bond, a finding that the plaintiffs did not pay any money to their attorneys to procure the dissolution of the injunction is not sustained by the evidence, where the only witness was a plaintiff, who testified directly that he agreed with the attorneys that they were to move for the dissolution of the injunction for a fee of four hundred dollars, which was paid to them before the action was brought upon the bond, and that other sums were paid for the services of the attorneys in defending the injunction suit.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Edward A. Belcher, Judge.

The facts are stated in the opinion of the court.

Vogelsang & Brown, for Appellants.

Boyd & Fifield, for Respondents.

HARRISON, J.—An action was commenced against the plaintiffs on behalf of the Abbey Land and Improvement Company et al. to enjoin them from doing certain acts, and an order for an injunction *pendente lite* having been made upon condition that they execute an undertaking to the plaintiffs herein in the sum of five hundred dollars, the de-

defendants herein executed such undertaking, and a writ of injunction was issued and served upon the plaintiffs. Subsequently the defendants—plaintiffs herein—gave notice of a motion to dissolve the injunction, and on May 21, 1896, brought on the motion before the court for hearing, and after reading affidavits in support thereof the motion was submitted to the court for its decision. Two days thereafter, before any decision upon the motion, plaintiff's attorney filed a dismissal of the action. The present action is brought to recover damages sustained by reason of the injunction, the only damages claimed being those arising from the services of counsel for procuring its dissolution. Judgment was rendered by the superior court in favor of the defendants, upon the grounds found as facts by the court that the defendants did not employ any attorneys or pay any money to procure the dissolution of the injunction, and that the injunction was dissolved by reason of the dismissal of the action at the instance of the plaintiffs. A motion for a new trial was made upon the grounds that the evidence was insufficient to sustain the decision of the court, and from an order denying that motion, as well as from the judgment, the plaintiffs have appealed.

The finding of the court that the plaintiffs did not pay any money to their attorneys to procure the dissolution of the injunction is not sustained by the evidence. The only witness at the trial was the plaintiff Frahm, and he testified distinctly that he made an agreement with the attorneys to move for the dissolution of the injunction for the sum of four hundred dollars, and that he had paid that sum to them before the present action was brought. Whether the money was paid in advance of the services or not until after the action had been dismissed was immaterial. This testimony of the plaintiff was not impaired by the fact that he had previously employed the same attorneys to defend him in the suit, or that the receipts given by them did not specify the particular object for which the payment was made.

The respondents' objections to the sufficiency of the specifications in this respect are not well taken. The "particulars"

in which the evidence is alleged to be insufficient are specified with sufficient clearness to point out the grounds upon which the appellants rely, and to enable the respondents, as well as the court, to cause the statement to properly present such evidence as is pertinent to those grounds. A statement that the evidence "fails to show" a particular probative fact essential to the judgment is substantially the same as saying that it is "insufficient to sustain" that fact.

Neither does the evidence sustain the contention of the respondents that the money was paid to the attorneys for services rendered by them generally for defending the suit, and not for the purpose of procuring a dissolution of the injunction. Frahm testified, and there was no contradictory evidence, that it was specifically agreed, before the motion for a dissolution was made, that the attorneys should be paid four hundred dollars for their services upon that motion, and also that he paid them other moneys for the other services rendered in defending the suit.

It is further contended by the respondents that there can be no recovery upon the undertaking, for the reason that, as the plaintiffs filed a dismissal of the action before any decision had been made upon the motion to dissolve the injunction, it was therefore never decided by the court that the plaintiffs in that action were not entitled to the injunction. It was held in *Dowling v. Polack*, 18 Cal. 625, that a dismissal of the action in which the injunction was issued amounted to a determination by the court that the injunction had been improperly granted. The dismissal in that case was for want of prosecution, and the court held that such dismissal had the same effect as would have resulted from a judgment upon the merits, saying: "Looking at the matter in the light of principle, it would seem that the failure of the plaintiff to prosecute his suit should be regarded as a concession of his inability to maintain it. The issues are not actually examined and passed upon but by his failure to appear he virtually confesses that the result of a trial would be to find them against him." In *Asevado v. Orr*, 100 Cal. 299, we said: "The voluntary dismissal of the

action by the plaintiffs had the same effect as a decision of the court that they were not entitled to the injunction.

The respondents do not content that the judgment entered upon such dismissal is not as effective a determination of the action as would be a judgment rendered upon the merits after a contested trial, but they urge that the defendants in the injunction suit cannot recover counsel fees as a part of the damage sustained by reason of the injunction, unless it is shown that the injunction was dissolved by reason of the services of such counsel, and that such damages are not recoverable when an injunction falls by reason of the plaintiffs' dismissal of the action. As the voluntary dismissal of the action by the plaintiffs was an admission by them that they were unable to maintain their action, and therefore that they were not entitled to the injunction, it must follow that, by the terms of the undertaking, the defendants are entitled to recover from the sureties whatever damage they sustained "by reason of the injunction." Inasmuch as counsel fees incurred by the defendants for the purpose of securing a dissolution of the injunction are recognized as a portion of the damage covered by the undertaking, the plaintiffs cannot, by their voluntary dismissal of the action, take from the defendants their right to recover for such counsel fees after they have been once incurred, any more than could they in that manner take away their right to recover whatever other damages they might have sustained by reason of the injunction. If upon the argument of the motion for its dissolution the plaintiffs became convinced that the motion ought to be granted, they could not deprive the defendants of their right to compensation for the counsel fees incurred by them, by rushing to the clerk's office and dismissing the action before the court could make its order upon the motion. In *Lanphere v. Glover*, 60 Ill. App. 564, the defendant gave notice of a motion to dissolve the injunction, but before it could be heard the plaintiff dismissed the action. The court held that the defendant was entitled to recover the fee of his counsel as a part of his damages, saying: "Whether the court was induced to dissolve the injunction by what the appellee did, or by the consent of

other parties, would seem not to affect the right of the appellee, provided that he actually sustained some damage which upon dissolution upon his own motion would properly come within an award in his favor. Now, the notice of a motion and attendance upon the court would be services of the counsel to be considered in an award of damages in case the dissolution had been upon his motion, and therefore we think they were properly considered in this case." (See, also, *Wallace v. York*, 45 Iowa, 81.) The meaning of the expression in *Curtiss v. Bachmann*, 110 Cal. 438, "An unsuccessful motion to dissolve an injunction does not authorize a recovery for the expense of counsel fees in making the motion," cited by the counsel for the respondents, is shown by the cases therein referred to, in which the motion had been denied in express terms. The rule there stated is not to be construed as applicable when the motion fails of success by reason of the plaintiff's act in preventing a determination of its merits. In *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282, after a motion to dissolve the injunction had been made, the court declined to hear it until the final hearing upon the merits, and then dismissed the complaint. It was held that the defendant could recover for the services of his counsel on that motion, the court saying: "His motion did not fail through any fault on his part or any defect in the merits of his case." This case was cited in *Curtiss v. Bachmann*, *supra*, as one of the exceptions to the rule that the motion must be successful in order to entitle the party to a recovery. The rule must be the same when, after the court has suspended its decision, the plaintiff causes the action to be dismissed before any decision is made. He can have no greater rights by his voluntary dismissal than would follow a dismissal against his will.

The judgment and order are reversed.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 1523. Department Two.—November 2, 1900.]

D. G. KENT and G. M. BRUCE, Appellants, v. SAN FRANCISCO SAVINGS UNION, Respondent.

APPEAL—ORDER GRANTING NEW TRIAL—AFFIRMANCE—LAW OF THE CASE—DUTY OF LOWER COURT.—The decision of this court upon questions of law, in affirming upon appeal an order granting a new trial, is the law of the case; and it is the duty of the lower court not to depart from the decision of this court upon the new trial.

ID.—NEW TRIAL IN FORECLOSURE—MARSHALING SECURITIES—SALE OF PURCHASED LAND—ERROR AS TO POWER.—Upon affirmance of an order granting a new trial of a foreclosure suit, a decision upon appeal that a decree in favor of the plaintiff, who, as a vendor of land, holds the title as security for the purchase money of land sold, foreclosing only a lien upon other lands held by him as collateral security for the purchase money, was erroneous as against the holder of a subsequent deed of trust of such other lands, and that the purchased land should be first sold, before the sale of the other lands, is the law of the case, which it is the duty of the court to enforce upon the new trial; and it is error to decide that the court had no power to order such sale, by reason of the finality of the former judgment as a bar thereto.

ID.—POWER OF COURT—RELIEF CONSISTENT WITH FACTS ALLEGED—PLEADING—ORIGINAL COMPLAINT—PRAYER.—The court had power where the original complaint was answered by the purchaser as well as by the subsequent lienholder, to grant any relief consistent with the facts alleged and embraced within the issues. It had power to order that the purchased lands be first sold as against the subsequent lienholder, under the original complaint, where it stated all the facts of the case, and set forth the contract of sale, containing a description of the property sold, as well as of the other lands, and asked not only for the foreclosure of the lien upon the other lands, but "for such other and further orders, judgments, and decrees as may be equitable."

ID.—AMENDED COMPLAINT—FORECLOSURE OF VENDOR'S SECURITY—STIPULATION AS TO ANSWER OF PURCHASER—JUDGMENT-ROLL.—Where an amended complaint was filed, expressly seeking a foreclosure of the vendor's security held by reservation of the title of the property sold, and seeking a first sale thereof, a stipulation made between the attorneys for the plaintiff and the attorney for the purchaser, that the answer of the latter "now on file to plaintiff's amended complaint be his answer to said amended complaint, when amended as hereinbefore specified," and entered upon the minutes

of the court, is binding and is part of the judgment-roll, and proves an answer of the purchaser to the amended complaint.

ID.—CONSTRUCTION OF FINDING—FILING OF PURCHASER'S ANSWER.—A finding that the purchaser "appeared and filed an answer in this action" must be presumed correct, and to refer to the amended complaint, upon which the court was acting.

ID.—STATUTE OF LIMITATIONS—NEW CAUSE OF ACTION NOT STATED.—The amended complaint did not bring in new parties or state a new cause of action; and the cause of action in the original complaint not being barred by the statute of limitations, it cannot apply to the amended complaint.

ID.—WAIVER OF VENDOR'S LIEN—TITLE HELD AS SECURITY—LIEN UPON OTHER LANDS—JUDGMENT UPON FORECLOSURE.—The title held by the vendor in trust for the purchaser, as security for the unpaid purchase money, was not waived by the taking of collateral security upon other lands, nor by the original judgment foreclosing the lien only upon the other lands, which was set aside by the order granting a new trial. The vendor did not, by so doing, evince a determination to waive the title held as security; nor did he put himself in such a condition that it would be inequitable upon the new trial to enforce the vendor's security, which was ordered to be first enforced in the decision upon appeal.

ID.—NEW TRIAL GRANTED UPON MOTION OF LIENHOLDER—FINALITY OF JUDGMENT AS TO PURCHASER—POWER OF COURT.—The fact that the new trial was granted upon motion of the subsequent lienholder only, and that the purchaser did not move for a new trial, or appeal from the judgment, and that it was final as to him, cannot deprive the court of power to correct the error made in the former decree, even though such correction may incidentally affect the purchaser.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. E. W. Risley, Judge.

The facts are stated in the opinion.

John Reynolds, for Appellants.

H. C. Campbell, and George A. Nourse, for Respondent.

COOPER, C.—This appeal is from a final judgment for respondent and from an order denying plaintiffs' motion for a new trial. The facts, as admitted, and as shown by the findings, are substantially as follows:

On the twelfth day of April, 1888, the plaintiffs, being the owners of certain real estate in Oakland, Alameda county, made a written contract with one Williams, by which they agreed to sell him said real estate for the sum of twenty-two thousand five hundred dollars, for which Williams gave them his promissory note, payable on or before April 12, 1891, and plaintiffs agreed to give to said Williams a conveyance of said property upon the payment in full of said note. The time for the payment of said note was afterward extended by plaintiffs to October 12, 1891. The said written contract contains this clause: "The said party of the second part [Williams] agrees to deposit with the First National Bank of Oakland, California, a deed in escrow in favor of said parties of the first part, of an undivided one-quarter interest in seventeen hundred and thirty acres, covering the greater portions of sections 21, 28, and 33, in township 13 south, range 23 east, in Fresno county California, and apply the proceeds of all sales of said land to the payment of said promissory note." Williams paid five hundred dollars upon said note, and by agreement of the parties went into possession of the Oakland property, agreeing to pay for the use of the same sixty dollars per month until the note should be paid. He afterward failed to pay any other portion of the note and became insolvent. The said written contract was recorded in Fresno county, and the deed which Williams agreed to execute was executed and deposited with the said First National Bank, and was afterward delivered by said bank to plaintiffs.

After the recording of said contract, but before the recording of said deed, and on the tenth day of January, 1889, the said Williams, with others, borrowed from the respondent, the San Francisco Savings Union, the sum of sixteen thousand dollars, and as security therefor executed to said savings union a deed of trust upon certain specifically described lands in Fresno county which are claimed by plaintiffs to be a part of the lands agreed to be conveyed to them in said contract between them and Williams.

In January, 1893, the plaintiffs commenced this action to enforce a lien upon the lands in Fresno county for the pay-

ment of the said note, without any offer to first enforce any lien which they have upon the Oakland property.

The prayer of the complaint was for a sale of the Fresno property, and the application of the proceeds of the sale to the payment of the note so made by Williams to plaintiff. The summons followed the complaint as to the nature of the action and the relief demanded. The action was against Williams, and respondent San Francisco Savings Union, and others. Judgment was rendered for plaintiffs for a sale of the Fresno lands as prayed for in the complaint. The San Francisco Savings Union, which will hereafter be designated as respondent, made a motion for a new trial, which was granted. From the order granting the new trial the plaintiffs appealed to this court, and the order was affirmed. (*Kent v. Williams*, 114 Cal. 537.) This court affirmed the order upon the ground that the plaintiffs had a lien upon the Oakland property and also upon the Fresno property, and the respondent had a subsequent lien, upon the Fresno property only; and having such subsequent lien it had the right to have the plaintiffs resort first to the Oakland property, upon which they held the exclusive lien. In the opinion it is said: "Therefore, in the case at bar, the lien which the plaintiffs reserved on the property in Oakland was not waived by taking the collateral security on the land in Fresno; and the respondent had the clear right to demand that the plaintiffs should first proceed upon their security on said Oakland property." The decision has become the law of the case, so far as the questions therein decided. Upon the case being remanded to the court below plaintiffs amended their complaint, and asked in the prayer thereof that the court might adjudge and find the amount due to plaintiffs, and that the Oakland property be sold first, and if the proceeds should not be sufficient to pay the plaintiffs the amount due them, then, upon a report of the deficiency, that the lands in Fresno be sold to satisfy such deficiency. The amended complaint was filed in April, 1897. No summons was issued upon the amended complaint, and the court found that it was never served upon defendant Williams.

Upon the new trial the court below held that the original complaint was not filed for the purpose of foreclosing the plaintiffs' lien upon the Oakland property, and that, as the first judgment had become final as to Williams, the court did not have the power to make a different decree and order the Oakland property sold first. In this we think the court erred. The main contention of the respondent on the former appeal was that the decree should have provided first for a sale of the property upon which it had no lien, but upon which plaintiff had a lien, so that respondent might have the full benefit of all the security held both by it and by plaintiffs. This court adopted the view for which respondent contended, and affirmed the order of the lower court granting a new trial. It was evidently intended that upon the new trial the court would proceed to make its decree in accordance with the law as laid down by this court. But upon the new trial the respondent contended, and, it seems, convinced the court below, that no decree could be made directing a sale of the property in Oakland, for the reason that such relief was not prayed for in the original complaint, and the original judgment had become final. It seems that respondent, after contending for a decree in a certain form, and obtaining a new trial upon the theory that the decree should have been as contended for by it, finally concluded on the new trial that it did not want such decree. It is really attempting to blow hot and cold at the same time. The original complaint contained a statement of all the facts connected with the transaction. It described the Oakland property and the Fresno property. It set forth the note and claimed the amount due upon it for the purchase price of the property in Oakland. And while it asked for a foreclosure of the mortgage and a sale of the premises in Fresno county, it also asked "for such other and further orders, judgments and decrees as may be equitable and just." Respondent, by its answer, claimed that as to it, it would be equitable and just to have the decree provide first for a sale of the Oakland property. The court held that it was entitled to such decree, and now it is here, claiming that the court had no power to make such decree. It is not necessary to decide whether or not it was incumbent

upon the plaintiffs to amend their complaint or to have served Williams with the amendment. He had appeared in the action, and had not denied any allegations of the complaint, but pleaded that since the making of the note he had been adjudged insolvent. Where a defendant appears and answers the court may grant any relief consistent with the facts alleged in the complaint and embraced within the issues. (Code Civ. Proc., sec. 580; *Gimmy v. Gimmy*, 22 Cal. 633; *Cummings v. Cummings*, 75 Cal. 434.) But, aside from this, we think the record shows that Williams answered the amended complaint. In a minute order of April 7, 1897, as to certain amendments to pleadings, after reciting certain proceedings, appears the following: "Attorneys for plaintiffs and said attorney for W. M. Williams now stipulate that the answer of W. M. Williams now in file to plaintiffs' amended complaint be his answer to said amended complaint when amended as hereinbefore specified." This stipulation became a part of the pleadings and was properly attached to the judgment-roll. (Code Civ. Proc., sec. 670.) This entry in the minutes of the court was binding. (Code Civ. Proc., sec. 283; *Merritt v. Wilcox*, 52 Cal. 240.) The findings state: "The said Williams appeared and filed an answer in this action." We must presume this finding to be correct and to refer to the amended complaint upon which the court was then acting. The cause of action is not barred by the statutes of limitation, as the complaint was filed within less than two years after the note became due. The amendment did not bring in new parties or state a new cause of action. It is contended that by asking for and procuring a judgment for the sale of the Fresno lands the plaintiffs waived their lien upon the Oakland lands, and many cases are cited. An examination shows that they were nearly all cases for the foreclosure of mortgages where the mortgagor had proceeded to foreclose upon and against a part only of the security. The law is correctly laid down in the cases applicable to the facts therein, as the code expressly says there can be but one action for the foreclosure of a mortgage; but the authorities do not apply to the facts of this case. Here

the plaintiffs took a conveyance of the Fresno lands as additional security, and this conveyance was intended as a mortgage. But they had as security the land they had agreed the convey, the title remaining in them. This title they held as security for the unpaid purchase money and as trustee for Williams. (2 Warvelle on Vendors, 722; *Woodard v. Hennen*, 128 Cal. 293; *Campbell v. Freeman*, 99 Cal. 547.) The authorities generally hold that to constitute a waiver of the vendor's lien there must be some act or omission by the vendor showing an intention on his part to waive the lien. (*Selna v. Selna*, 125 Cal. 361.) In the case last cited the test as to whether or not there has been a waiver is said to be: "Has the vendor, by such or such an act or omission, so placed his rights in relation to the lands sold, or to the vendee, that it would be inequitable to sustain this right in his favor, or has his act been such that it shows a determination not to rely upon his lien?"

We do not think, applying this test, that plaintiffs have waived their lien upon any of the lands in either place. They brought suit to foreclose upon the Fresno lands, evidently believing that the title still remained in them to the Oakland lands, and that it was not necessary to include them. Respondent contended that the court, as a court of equity, should protect it, by requiring plaintiffs first to exhaust the security upon which respondent had no lien. This should be done, and the decree should so provide. This course will give to plaintiffs all the security it had when it took the note. It will deprive respondent of no security upon which it acquired a prior lien. It is said by respondent that the decree for the sale of the Fresno property was and is a final decree, and that while it stands the court can make no further decree regarding it. If such is the case, the order granting respondent a new trial must go for naught. But the very object of respondent's motion for a new trial was to be relieved of the judgment and decree directing the sale of the Fresno property alone. The new trial was granted for the reason that the court had erred in concluding and directing a sale of the

Fresno property, regardless of the equities of the respondent. This new trial was granted for the purpose of awarding to respondent a correct decree which should direct the order in which the property was to be sold. The judgment as to all parties, other than respondent, became final as to them in the sense that they could not further contest it. But as the new trial was granted on the motion of one party only, the court had the power to correct the error that had been made in the former decree even if such correction in some way incidentally affected other parties to the suit. It would be a strange doctrine if a court, in an action against several defendants, made a decree doing injustice to one of them, and, on application of the one alone granted a new trial, should then be powerless to grant any relief at all as to the one, or to modify its decree so as to make it what it should have been in the first place. The respondent's position is that the court in the first decree granted more relief than it should have done as to respondent, and that, since granting respondent a new trial, the court can grant no relief against it, for the reason that the other defendants did not make any motion for a new trial nor appeal from the judgment. In *Pfister v. Wade*, 69 Cal. 133, a judgment was rendered originally against Judson and Wade. Judson alone appealed from the first judgment, and it was reversed. Upon the retrial it seems Wade, who had not repealed from the original judgment, was allowed to participate. In the opinion it is said: "It is contended by appellant Judson that, as Wade never appealed from the original judgment entered in this cause, the reversal thereof did not apply to him, and, as a consequence, that he had no right to participate in the last trial. The answer to the position is that this court reversed the judgment of the court below, and that thereupon, on motion of counsel for Bliss, the assignor of Judson, the judgment of the court below was vacated and set aside. This action having been brought about by Bliss, he and his assignee are not in a position to question its regularity."

The description contained in the deed made by Williams to plaintiffs need not be discussed. There is nothing said

about it in the findings, nor about the deed, except that it was intended as a mortgage and as collateral security, and the conclusions of law do not show that it was in any way considered by the court in ordering judgment for defendant.

It follows that the judgment and order should be reversed. Chipman, C., and Gray C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

Temple, J., Henshaw, J., McFarland, J.

Hearing in Bank denied.

[S. F. No. 1675. Department Two.—November 2, 1900.]

JULIA SCOTT O'BRIEN, Respondent, v. MICHAEL O'BRIEN, Appellant.

DIVORCE—JUDGMENT DISSOLVING MARRIAGE—SUBSEQUENT ORDER FOR ALIMONY.—Where a final decree is entered in an action of divorce dissolving the marriage, in which no mention is made of counsel fees or alimony, the trial court is without jurisdiction to subsequently make an order granting alimony or counsel fees

APPEAL from an order of the Superior Court of the City and County of San Francisco. A. A. Sanderson, Judge.

The facts are stated in the opinion.

Beatty & Beatty, and Beatty & Sanderson, for Appellant.

Henley & Costello, for Respondent.

CHIPMAN, C.—Action for divorce. On July 25, 1895, the trial court entered its final decree dissolving the bonds of matrimony theretofore existing between the parties. No mention was made in the decree of counsel fees or alimony. Subsequently, to wit, on October 1, 1895, a motion was served on defendant that plaintiff would, on October 4, 1895, move the court for an order awarding plaintiff counsel fees and ali-

mony. Pursuant to the motion the judge made an order granting permanent alimony of sixty dollars per month and four hundred dollars counsel fees. Defendant appeals from this order. There is no brief on file for respondent.

It was held in *Howell v. Howell*, 104 Cal. 45, that where a final judgment has been rendered in a divorce suit, and the time for appeal has passed, settling the property rights of the parties, without reserving jurisdiction (when that can be done) to make a supplemental decree, and the judgment is final in form and substance, it is as final as any other kind of a judgment, unless power to modify it is given by some statute. The statutes on the subject were pointed out, and it was held that there is no statutory provision giving jurisdiction to make the order appealed from in that case.

In a former appeal of the present case, S. F. No. 1070, the question related to the power of the court to amend the decree *nunc pro tunc*, by inserting therein a reservation over the subject of alimony and counsel fees, and it was held to be beyond the power of the court to do so. (*O'Brien v. O'Brien*, 124 Cal. 422.) It was there said: "When the court entered its final decree of July 25th, it had no further jurisdiction over the parties or the subject matter." (Citing *Howell v. Howell*, *supra*.)

We think the jurisdiction to make the order was adversely determined in the former appeal when it was held to be beyond the power of the court to amend the decree in the manner attempted. Upon the authority of *Howell v. Howell*, *supra*, and the decision in the former appeal of this case, the order should be reversed.

Haynes, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the order is reversed. Henshaw J., McFarland, J., Temple, J.

[S. F. No. 1694. Department Two.—November 2, 1900.]

SAMUEL TEVIS, Appellant, v. O. H. SAVAGE, Respondent. FERON & BALLOU COMPANY, Appellant.

STATUTE OF FRAUDS—VERBAL PROMISE TO ANSWER FOR THE DEBT OF ANOTHER—RECEIPT OF PROPERTY—ORIGINAL OBLIGATION.—A mere verbal promise to answer for the debt or default of another person is void under the statute of frauds; but a verbal promise made by one who has received property from the debtor under an agreement to apply it or its proceeds in payment of his debt to another person is founded upon a sufficient consideration, and is an original obligation, not within the statute of frauds.

ID.—PROMISE OF CORPORATION PURCHASING FRUIT—PAYMENT OF VENDOR'S DEBT—GENERAL AGENCY—AGENT NOT LIABLE.—A verbal promise by the general agent of a corporation which, through the general agent, purchased fruit from a vendor, who had before purchased it from the plaintiff upon credit, that the corporation would see the plaintiff paid, and that when it sold the purchased fruit and received returns he would pay plaintiff's bill, is binding upon the corporation; but the agent, who was dealt with and treated as such by the plaintiff, cannot be held personally liable upon the promise.

ID.—ORIGINALITY OF PROMISE—POSSESSION OF FRUIT—INDEBTEDNESS TO VENDOR.—The promise of the corporation to pay the debt of its vendor to the plaintiff was original, and not within the statute of frauds, regardless of whether the fruit was received by it upon the understanding that it was to pay the plaintiff from the proceeds, or whether, after the possession of the fruit was received and while it still owed its vendor therefore, it undertook to apply the proceeds of sale to the payment of its vendor's debt to the plaintiff.

APPEALS from an order of the Superior Court of Santa Clara County granting a new trial as to the corporation appellant and denying it as to the defendant respondent. A. S. Kittredge, Judge.

The facts are stated in the opinion.

C. D. Wright, and John Reynolds, for Samuel Tevis, Appellant.

J. R. Welch, for Feron & Ballou Company, Appellant, and for Respondent Savage.

COOPER, C.—This action was brought to recover of defendants the sum of seventeen hundred and sixty-two dollars, balance due for sale of fruit by plaintiff to one Herbert during the year 1896. The complaint alleges that defendants willfully and fraudulently represented to plaintiff that they were backing Herbert in buying fruit, and that any contract that he might make with Herbert would be performed on his part. That the defendants promised to pay, or guaranteed the payment of, the amount that should become due to plaintiff by reason of sales of fruit to Herbert during the season of 1896. Upon the close of plaintiff's testimony the court granted a nonsuit as to both defendants, and judgment was accordingly entered. Plaintiff made a motion for a new trial, which was denied as to defendant Savage and granted as to defendant corporation. Plaintiff appeals from the order denying his motion as to defendant Savage, and defendant corporation appeals from the order granting the motion as to it. By stipulation both appeals are brought up and argued upon the same record. The question to be determined is as to the correctness of the ruling of the court in granting the nonsuit. The learned judge of the court below, in an opinion printed in one of the briefs, sets forth the gist of the evidence and the reasons which impelled him to grant a new trial as to the defendant corporation and to deny it as to defendant Savage.

It appears from the evidence that Herbert went to plaintiff to buy his fruit in the latter part of July, 1896, and defendant Savage, as the agent, and not otherwise, of the defendant corporation, went with him. Savage told plaintiff that he was the agent of the corporation, and that the corporation was backing Herbert, furnishing him with money to carry on his business, handling all his fruit; that plaintiff would be perfectly safe in making any contract with Herbert for the sale of fruit, and that the corporation would see that any such contract was paid by Herbert. Savage further asked plaintiff to look into the financial standing of the corporation. On the twenty-eighth day of July, 1896, without making any inquiry into the financial standing of the corporation, plaintiff entered into certain contracts with Herbert in writing, whereby he agreed to sell, and Herbert agreed to buy, the fruit of plaintiff upon the terms therein named. About two

weeks after entering into these contracts plaintiff inquired as to the financial standing of the corporation, and was informed that it was perfectly responsible. Plaintiff then delivered the fruit to Herbert under the contracts made with Herbert alone. Plaintiff states that he looked primarily to Herbert to pay for the fruit sold to him, and if he did not pay then to the corporation. The evidence does not show any willful misrepresentation or bad faith, or intent to deceive on the part of either of the defendants. It shows that there was no contract or agreement in writing by either of them to answer for the debt, contract, or default of Herbert. The agreement, therefore, if such there was, to answer for the debt, default or miscarriage of Herbert was void. (Civ. Code, sec. 1624, subd. 2; *Clay v. Walton*, 9 Cal. 328, 333; *Ellison v. Jackson Water Co.*, 12 Cal. 542, 553; *Harris v. Frank*, 81 Cal. 280, 286.)

The evidence shows that in all the transactions the defendant Savage was only the agent of the corporation and was dealt with and treated as such by plaintiff. He was introduced to plaintiff as such agent, and plaintiff in his testimony says that Savage said to him, "I represent the Feron & Ballou Company and they will see you paid." It follows that the court properly granted the nonsuit as to defendant Savage. But a different state of facts is presented as to the corporation. It has before been shown that the corporation did not become bound to pay the debt of Herbert originally. But under the contract made by the corporation with Herbert it received the fruit sold by plaintiff Herbert. It appears from the testimony (which we must presume to be true on the motion for nonsuit) that Herbert paid plaintiff seven hundred and fifty dollars, and one thousand dollars more was due upon the delivery of the fruit as the first payment under the contract. The contract provided that one-half should be due upon the completion of the delivery of the fruit by plaintiff, and the balance sixty days thereafter. The plaintiff then, having delivered all the fruit to Herbert, and the defendant corporation having received it all from Herbert, demanded the balance of the one-half due upon delivery, to wit, one thousand dollars. Plaintiff went with Herbert to Savage, the agent of the corporation, and Savage stated to

plaintiff that he had made arrangements with the Union Savings Bank for Herbert to draw a check for the one thousand dollars, and Herbert accordingly drew and delivered to plaintiff the check for one thousand dollars, which was paid. Savage went with plaintiff to the bank to collect the check, and on the way to the bank said to plaintiff, "That Mr. Herbert's credit was good; that he was entitled to credit, and that the goods had all been sold as fast as they were delivered; he was waiting on returns from them to pay us out of the proceeds of Mr. Herbert's fruit." Savage requested plaintiff to allow the money to remain in the bank for a month, as this would the more easily enable him to raise at the same bank the final payment when it became due. Plaintiff left the money in the bank as requested by Savage. Savage further stated to plaintiff, in the same conversation, "That the fruit had been forwarded, and as fast as the returns came in we would be paid out of the proceeds of the fruit." Savage further said to Mr. Wright, the attorney for plaintiff, "That the fruit had gone forward, and just as soon as they received returns from the consignment that the fruit would be paid for. . . . He said that as soon as the returns came in he would pay plaintiff's bill. . . . Savage said that they had money on hand to pay all of Herbert's bills; that he had made money and said he would clear at least two thousand dollars."

Herbert testified that after the fruit had been delivered he was at defendant's office, and there in the presence of plaintiff Savage wrote on a piece of paper in effect: "Now, I tell Mr. Tevis when the balance becomes due to come to me and I will give him check for the amount and charge the same to your account, and you can give me a check to cover it." The witness said that he was hard of hearing, and that for this reason Savage wrote on the slip of paper as he often did in talking to witness. This testimony shows that after plaintiff had been paid the first installment of seventeen hundred and fifty dollars, and at the time the last check of one thousand dollars was given, the fruit was all in the hands of the corporation; that Savage promised to pay plaintiff out of the proceeds of the fruit; that Herbert was present and made no objection to the arrangement.

Now, the corporation had received the property of Herbert. The fruit of plaintiff had been delivered to it. It owed Herbert for the fruit and undertook and promised, not to pay the debt of another, but its own debt to Herbert. True, it was to be paid to plaintiff, but it was still the debt of the corporation, and plaintiff was by consent substituted as the party to whom payment should be made. Instead of being bound to pay Herbert, after the promise the corporation was bound to pay plaintiff. The statute does not require the promise of one to pay his own debt to be in writing. If a person by promising to pay his own debt thereby engages to pay the debt of another, this incidental effect does not render the promise void or ineffectual. It is provided in subdivision 1, section 2794, of the Civil Code that the promise to answer for the obligation of another is deemed an original obligation of the promisor and need not be in writing "where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise."

The evidence very strongly tends to show that the corporation received the fruit upon an understanding that it was to pay plaintiff from the proceeds; but whether it does or not, and conceding that it does not, it certainly *prima facie* shows that after defendant had received the fruit it undertook to apply the proceeds to the payment of Herbert's debt to plaintiff. We think for the same reasons the rule would apply to the corporation, if it made the promise while the fruit was in its hands and while it still owed Herbert for it. This view is sustained by the supreme court of Pennsylvania in *Dock v. Boyd*, 93 Pa. St. 92. The court said: "That Dock had means in his hands belonging to Miller was in evidence, . . . upon the faith of which his verbal promise to pay the debt was accepted. Such being the case, it was clearly not within the statute of frauds. . . . The promise is not a collateral but an original one, founded on sufficient consideration."

That such promise is not within the statute of frauds, see Brandt on Suretyship and Guaranty, sec. 49; Brown on the Statute of Frauds, sec. 187; *McLaren v. Hutchinson*, 22

Cal. 187, 190¹; *Malone v. Crescent City Mill etc. Co.*, 77 Cal. 38, 43; *Fullam v. Adams*, 37 Vt. 391, 403; *Robinson v. Gilman*, 43 N. H. 485, 491.

As Savage was the general agent of the corporation in purchasing dried fruit on the Pacific Coast and managing all its business here, he had the power to make the promise to pay the proceeds of the fruit to plaintiff under the circumstances of this case. (Civ. Code, sec. 2310; Wharton on Agency, secs. 121, 122; Story on Agency, secs. 50, 60; *Hays v. Campbell*, 55 Cal. 424²; *Hoskins v. Swain*, 61 Cal. 338, 340.)

What has been said in this opinion is to be construed only as having reference to the ruling on the nonsuit and order granting a new trial. The facts, of course, will have to be determined at the trial upon all the testimony.

We advise that the orders be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the orders are affirmed. Henshaw, J., McFarland, J., Temple, J.

Hearing in Bank denied.

[S. F. No. 2126. Department Two.—November 3, 1900.]

In the Matter of the Estate of JACOB BEHRENS (Also Known as James Behrens), Deceased. CAROLINE WEISSICH, Proponent of Will, Appellant, v. HENRY BEHRENS et al., Contestants of Will, Respondents.

WILL—CONTEST OF PROBATE—PLEADING—INFERENTIAL AVERMENT OF HEIRSHIP—ABSENCE OF DEMURRER.—Upon the contest of the probate of a will, the description of the contestants as "brother and sister and heirs at law" of the deceased, in the introducing sentence of their opposition to the probate, without any direct averment of their heirship, constitutes an inferential averment thereof, which, in the absence of a demurrer to the opposition, will be held sufficient after judgment.

¹ 83 Am. Dec. 59.

² 36 Am. Rep. 43.

ID.—SUPPORT OF FINDING OF HEIRSHIP—SUFFICIENCY OF EVIDENCE—ABSENCE OF SPECIFICATION.—Where there was slight evidence that the contestants were the next of kin of the deceased, in addition to an averment thereof in the petition for probate (to which there was a general denial, and the hearing of the contest seems to have proceeded upon the assumption of such kinship, a finding that the contestants were the next of kin of the deceased is sufficiently supported to make the rule applicable that the finding must be deemed conclusive, in the absence of a specification of the insufficiency of the evidence to justify that particular finding.

ID.—CONTEST OF OLOGRAPHIC WILL.—GENUINENESS OF DATE—FINDING—CONFLICTING EVIDENCE—APPEAL.—Upon a contest of the probate of an olographic will, involving an issue as to the genuineness of the handwriting of its date, a finding upon conflicting evidence that the date was not in the handwriting of the deceased, and that the instrument proposed for probate was not the will of the deceased, cannot be disturbed upon appeal.

ID.—OPINION OF JUDGE—COMPARISON OF HANDWRITING—ORAL EVIDENCE—RECORD—REASONS FOR FINDINGS.—Statements in the opinion of the judge, showing that he was strongly influenced in his conclusions by the comparison of the handwriting of the deceased, does not show that he improperly usurped the functions of an expert or that he disregarded the oral evidence. His opinion forms no part of the record and his reasons for correct findings of fact are immaterial.

APPEAL from an order of the Superior Court of Santa Clara County denying the probate of a will. M. M. Hyland, Judge.

The facts are stated in the opinion.

Henry C. Gesford, and H. G. W. Dinkelspiel, for Appellant.

E. E. Cothran, for Respondents.

CHIPMAN, C.—Appeal by Caroline Weissich, a legatee under the alleged olographic will of Jacob (sometimes known as James) Behrens, deceased, from an order of the superior court of Santa Clara county denying the probate of the will. Grounds of opposition to the probate were filed by E. E. Cothran, Esq., appointed by the court as attorney for absent heirs, on behalf of Henry and Augusta Behrens, claiming to be brother and sister of deceased. The will bears a date written between the body of the will and the signature in the following form: "Febr. 12, '98." No issue is raised as to the genuineness of the body of the will or the signature, both be-

ing conceded to be in the handwriting of deceased. The issues were tried by the court without a jury, and the court denied probate of the will on the ground that the date is not in the handwriting of deceased. The evidence is brought up by bill of exceptions.

The material issues of fact urged here by appellants are: 1. Whether the date, "Febr. 12, '98," is in the handwriting of deceased; and 2. Whether the contestants established the fact of their heirship, which it is urged should be specially alleged and proved. The following questions are also presented: 1. As to the sufficiency of the grounds of opposition; and 2. Whether the abbreviation, "Febr. 12, '98," constitutes a date.

1. It is contended that there is no direct allegation in the grounds of opposition that the contestants are heirs at law of deceased, and that they contain no allegation of the appointment of Mr. Cothran as attorney to represent contestants. The allegation is: "Now come Henry Behrens and Augusta Behrens, brother and sister and heirs at law of said James Behrens, deceased, by E. E. Cothran, their attorney, and contesting the will filed in this court, for grounds of contest state." Then follow allegations that the word and figures "Febr. 12, '98" are not in the handwriting of deceased, etc. There is no direct allegation that Henry and Augusta are heirs at law or brother and sister of deceased; nor is there any direct allegation of Mr. Cothran's appointment.

There was no demurrer to the opposition. So far as the pleading is concerned, the rule is that where a fact is stated only inferentially, and no demurrer is interposed, the pleading will be held good after judgment. (*Hill v. Haskin*, 51 Cal. 175; *Cushing v. Pires*, 124 Cal. 663, and cases there cited.) There was no such inherent defect in the pleading as would show failure to state a ground of contest, and hence the cases cited by appellant do not apply.

2. It is claimed that the evidence is insufficient to establish heirship of contestants. The court found "that the next of kin of said deceased are said contestants." There is no specification wherein the evidence is insufficient to sustain this finding, and under section 648 of the Code of Civil Procedure the point cannot be reviewed. (*Winterburn v. Chambers*, 91 Cal. 170.) But appellant claims an entire absence of evi-

dence to sustain the finding, and that in such case the burden is on the party sustaining the findings to call attention at least to enough evidence to justify the finding. (Citing *San Luis Water Co. v. Estrada*, 117 Cal. 168.) In the petition to probate the will petitioner (appellant) alleged that Henry and Augusta were brother and sister and next of kin of deceased. The answer to the opposition was a general denial of its allegations, and if it may be held to withdraw the admission in the petition, or that the petition cannot be referred to where the issue is raised by contest, still there was elsewhere in the record some, though slight, evidence in support of the finding. The hearing seems to have proceeded on the assumption that the contestants were next of kin. We do not think the record warrants a departure from the general rule stated in *Winterburn v. Chambers*, *supra*, and other cases that might be cited.

3. Appellant challenges the finding that the date of the will is not in the handwriting of the testator. He died March 6th, about three weeks after the date of the will. It is claimed that the court erroneously discarded all the oral testimony, and, assuming the position of an expert on handwriting, decided the point on the documentary evidence alone. There were numerous examples of the handwriting of deceased introduced in evidence by both parties running through many years and down to a time after the date of the will, many of which have by stipulation been sent here for inspection by this court, though not printed in the transcript. The record also contains a copy of the written opinion of the learned judge who heard the evidence, the purpose being, we presume, to show that the oral evidence was not considered by him. In this opinion the trial judge gives a very searching analysis of the characteristics found in the admitted handwriting of deceased, and, by numerous comparisons of his known writing with the writing in question, reaches the conclusion that the date was not written by deceased. There was evidence tending to show that the body of the will and the signature were written at a different and earlier period than the date and with a different pen. The will was found about two weeks after the death of Mr. Behrens, in a box with other papers, which "had a lock and key, but was open." He occu-

pied a room in a hotel at his death, the key to which was kept by the landlord. Mr. Dennis, a witness for proponent, who was familiar with the handwriting of Mr. Behrens, testified that in his opinion the will was entirely in the handwriting of deceased. He also testified: "My opinion is that the date 'Febr. 12, '98,' was written after the body of the instrument, and that the signature was written before the date 'Febr. 12, '98.'" Mr. S. L. Rogers, an attorney at law, who had known deceased for twenty-five years and had attended to much of Mr. Behrens' business, and was familiar with his handwriting and produced many specimens of it, testified for contestants that Mr. Behrens had consulted him as to how to draw an olographic will, and received particular instructions from the witness as to the code requirements; that Mr. Behrens made many wills, some of which witness drew, which were destroyed. This witness testified quite fully as to the differences apparent between the disputed handwriting and that which was admitted to be genuine, some of which differences were stated in the opinion of the court much the same as by this witness. Mr. Rogers was asked on cross-examination if he could swear that the words and figures of the date were not in Behrens' handwriting and answered: "No, sir, I wouldn't swear they were not in his handwriting, but they don't look like his handwriting, both the ink nor the making of the letters and all of them. I cannot swear that he didn't write the words 'Febr. 12, '98,' but I can swear that it does not compare, and I don't believe it is his handwriting." He gave as a reason for his belief that on one occasion Mr. Behrens "wanted to know if he could make a will that looked like a will, an olographic will, but that would not be an olographic will. . . . Q. He had reasons for wanting to do that? A. he told me that he had reasons therefor, as I state now, I will say that I don't believe it is his handwriting; I believe it was put there by somebody else." Appellant contends that this evidence shows that the witness based his belief entirely on the reason last given. But it is clear from the minute comparison made by the witness between the known handwriting of deceased and the date in the will that his judgment did not rest alone on the circumstance brought out on re-examination; this was but an additional reason for his opinion. Mr.

Rogers was the only witness for contestants who testified to any opinion as to the handwriting.

Mr. Dennis testified to familiarity with the handwriting of deceased, and expressed the opinion and belief of the genuineness of the date, although, as we have already stated, he also said he thought it was written some time after the body of the will and the signature were written. His cross-examination brought out the admission that he "did not know much about handwriting," and it also developed the fact that he could not satisfactorily account for the striking difference observable between the formation of the letters and figures of the date and the formation of the same letters and figures in the numerous examples produced of handwriting before and after the purported date of the will.

The only other witness on the question of handwriting for proponent was her son, who testified very positively that the will from beginning to end was entirely in the handwriting of Mr. Behrens, and he testified that he had attended to business for him and was familiar with his handwriting. He did not enter into particulars, made no comparison of the testator's handwriting, and was not cross-examined on the subject; he was not asked to nor did he attempt to give any reasons for his opinion.

Mrs. Weissich testified in her own behalf, but not to throw any light upon the question of the handwriting. She testified to a long friendship existing between deceased and her husband before the latter's death, and herself both before and after that event. She testified: "He told me that he would leave me something out of pure friendship for forty years for me." Again, in speaking of letters she had received from him since her husband's death, she testified: "I can't say whether there was an conversation about making the will." This was all the testimony bearing upon the question of the testator's intention, and is too slight to affect the question now here if it be conceded to be admissible for that purpose.

We cannot see that the trial judge usurped the function of an expert witness. He simply examined the testimony and the evidence before him in the form of admitted examples of the handwriting of the deceased. The testimony of the witnesses was in conflict. The judge accepted that of the con-

testants and rejected that of the proponent. This he had a right to do, and as the testimony was conflicting his decision cannot be reviewed here. It does not appear from the opinion of the judge found in the record that he entirely disregarded the oral evidence, and even if he did we cannot say that he had no right to do so. He stated certain facts which appeared from a comparison of the various writings of deceased before him, by which it is but fair to assume that he was strongly influenced in forming his conclusion; but it does not follow that he was not also influenced in some degree by the oral testimony. Furthermore, the opinion of the judge forms no part of the record. If his conclusion was correct it is immaterial what reasons he assigns for it.

Inasmuch as the court found no sufficient evidence that the will was not "the last or any will of said James Behrens, deceased," it becomes unnecessary to pass upon the other questions presented by appellant.

The order should be affirmed.

Haynes, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. Henshaw, J., McFarland, J., Temple, J.

[S. F. No. 1702. Department One.—November 5, 1900.]

W. H. BUTLER, Appellant, v. C. GOSLING et al., Respondents.

MEXICAN GRANT TO HUSBANDS—CONVEYANCE AND PATENT TO WIVES—SEPARATE PROPERTY—POWER OF HUSBANDS.—Where a Mexican grant of a rancho to two husbands was conveyed by them to their wives, in whose names the grant was confirmed and patented, the land so conveyed, confirmed, and patented is the separate property of the wives, which the husbands, as such, had no power to alienate.

ID.—DEED OF PATENTED LAND BY HUSBANDS AND WIVES—EXCEPTION—EFFECT UPON TITLE.—An exception in a deed of the patented rancho executed jointly by the husbands and their wives does

not inure to the husbands and wives jointly, nor create a title in the husbands which they did not possess immediately before the deed was executed. It leaves the title to the excepted land in the wives, as their separate property, as fully as if no deed had been executed.

ID.—RESERVATION OF TRACT TO BE SELECTED AND LOCATED—EXCEPTION—PROOF IN EJECTMENT.—A deed of the patented rancho by the husbands and wives, “reserving and saving from the effect and operation of this conveyance four square miles in two separate parts, to be selected and located by the parties of the first part,” has the effect of an exception of the land reserved. But the exception does not show a title upon which an action of ejectment can be maintained, without proof that the excepted land has been selected and located.

ID.—POWER OF ATTORNEY FROM HUSBAND—SALE AND CONVEYANCE—SELECTION AND LOCATION NOT INCLUDED—TITLE NOT SHOWN.—A power of attorney from one of the husbands subsequent to such deed to sell and convey any portion of the rancho does not include power to select and locate the excepted tract of four square miles, nor can a deed by the attorney in fact of such husband of a larger tract operate either as a selection of such excepted tract or to prove any title to the land conveyed.

ID.—EXCEPTION IN DEED FROM GRANTEES—RECITAL OF RESERVATION BY HUSBANDS—TITLE NOT CONFERRED UPON STRANGERS.—An exception made by the grantees of the husbands and wives, in a subsequent conveyance, limited by its terms to land “heretofore disposed of and reserved” by the husbands named, cannot operate to confer title upon the husbands or upon any strangers to the instrument.

ID.—ADMISSION OR ESTOPPEL BY RECITAL—FAILURE OF PROOF.—Though such recital in the deed might, under certain circumstances, operate as an admission or estoppel in favor of the husbands named or their grantees, it cannot have that effect, where there is a failure to prove that the husbands named, or either of them, had disposed of or reserved any land prior to the conveyance.

ID.—EJECTMENT—REFUSAL OF AMENDMENT TO COMPLAINT—RENT—TITLE NOT PROVED—NONSUIT.—A plaintiff in ejectment, whose proof of title has failed, is not injured by the refusal of the court to permit an amendment to the complaint, claiming rent of the demanded premises; and a nonsuit is properly granted for failure of the plaintiff to prove title.

APPEAL from a judgment of the Superior Court of Napa County and from an order denying a new trial. E. D. Ham, Judge.

The facts are stated in the opinion of the court.

Robert Ash, and Moses G. Cobb, for Appellant.

F. E. Johnston, H. L. Johnston, and L. E. Johnston, for Respondents.

HARRISON, J.—Ejectment. The land described in the complaint is a part of the Rancho de Las Putas, which was granted by the Mexican government, and for which a patent was issued by the United States in 1863 to Nicholasa Higuera de Berryesa and Anastasia Higuera de Berryesa. In 1853 these patentees, with their respective husbands, conveyed to I. N. Thorn and John Treat the entire rancho, “reserving and saving from the effect and operation of this conveyance four square miles in two separate parts to be hereafter selected and located by the said parties of the first part, the lines of said reservations to conform to the lines shown on the plan of survey heretofore referred to, known as Van Doren’s.” In 1854 and 1855 Thorn and Treat executed conveyances to David N. Hunt and J. W. Hunt of the entire rancho, “saving and excepting six square miles heretofore disposed of and reserved by Jose Jesus and Sisto Berryesa.” In 1861 Sisto Berryesa, the husband of Nicholasa aforementioned, made a power of attorney to Jose Santos Berryesa, “to mortgage, sell, and convey Las Putas Rancho or any portion thereof”; and under this power of attorney a conveyance was made March 2, 1862, to one Mathews, of a tract of land which includes the premises described in the complaint. Mathews conveyed the demanded premises to B. F. Butler, from whom the plaintiff claims by inheritance.

After the plaintiff had introduced the evidence of his title as shown by these conveyances, the defendants moved for a nonsuit on the ground, among others, that he had not shown any title or right to the possession in him of any part of the demanded premises. The motion was granted, and from the judgment thereon the plaintiff has appealed.

As the plaintiff’s title is derived under the conveyance from Mathews to his father, it was incumbent on him to show that at the date of the conveyance Mathews had title to the land. Prior to any conveyance to Mathews the title to the entire rancho had become vested in the Hunts, with the exception of that portion which was included within the ex-

cepting clause made in the deed to Thorn and Treat. By the terms of this clause the grantors excepted "from the effect and operation of the conveyance" four square miles to be thereafter selected and located "by the parties of the first part." Although this excepting clause begins with the word "reserving," it was in reality, as its terms declare, an "exception" of a portion of the land from the effect and operation of the conveyance, and the four square miles thus excepted remained the property of the grantors as fully as if no conveyance had been made by them. The exception had the effect to leave the title to the excepted portion precisely as it was before the execution of the instrument. It did not create a title in either of the parties thereto other than they had possessed prior to its execution. It does not appear from the record that any conveyance of the premises described in the complaint has ever been made by either of the patentees.

The only title which the plaintiff showed to have been held by Mathews to any part of the land was such as he derived under the power of attorney from Sisto Berryesa. But by the terms of the exception in the conveyance to Thorn and Treat the land which was excepted was to be thereafter selected and located "by the parties of the first part" to that conveyance, and there is no evidence that such selection and location had ever been made. Neither is there any evidence that Sisto Berryesa ever made such selection and location, even if it had been competent for him to do so. The plaintiff's claim of title is derived under a conveyance executed by the attorney of Sisto, who had power only to "mortgage, sell and convey" any portion of the rancho. He was not authorized to make the selection and location of the four square miles named in the deed to Thorn and Treat, and a conveyance by him of a tract of land that had not been "selected and located," and which was greater in extent than four square miles, could not operate as a selection of any portion of the rancho.

If it be assumed, as is claimed by the appellant, that the grant from the Mexican government was to Sisto and Jose Berryesa, and that the persons to whom the patent was issued were their respective wives, yet as they had conveyed the rancho to their wives before the petition to the land commis-

sion for confirmation, the land became the separate property of their wives, and the husbands, as such, had no power to alienate it. (*Taylor v. Opperman*, 79 Cal. 468.)

The excepting clause in the conveyance from Thorn and Treat to the Hunts did not operate to vest any title in Sisto Berryesa. This exception is by its own terms limited to land "heretofore disposed of and reserved" by Jose Jesus and Sisto Berryesa. A reservation or an exception in a conveyance will not confer title upon a stranger to the instrument, although under certain circumstances it may operate as an admission in his favor, or as an estoppel against the grantor. It was not shown that Jose Jesus and Sisto Berryesa, or either of them, had ever disposed of or reserved any land prior to this conveyance to the Hunts.

The appellant suffered no injury by the refusal of the court to permit him to amend his complaint so as to set forth a claim for the value of the rent of the premises. If he was unable to sustain his right to the land, he could not be entitled to any recovery for its rental value.

The judgment is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 1268. Department One.—November 5, 1900.]

CHARLES B. RYLAND, Respondent, v. R. HENEY, Jr.,
Appellant.

APPEAL FROM JUDGMENT—REVIEW OF EVIDENCE—SUPPORT OF FINDINGS.

Upon appeal from a judgment, taken more than sixty days after the entry thereof, the evidence cannot be reviewed to ascertain whether it supports the findings.

Id.—SUPPORT OF JUDGMENT—CONSISTENCY OF FINDINGS—STATUTES OF LIMITATIONS—SEPARATE ITEM—PRESUMPTION OF WRITTEN CONTRACT.—A general finding that no part of plaintiff's cause of action is barred by the statute of limitations is not to be deemed in-

consistent with a finding upon an item more than two years old and less than four years old not included in a written contract set forth in the answer and findings. It must be presumed from the general finding that such item was based upon a written contract.

ID.—BARRED ITEM—MODIFICATION OF JUDGMENT.—An item shown in the findings to be barred by the statute of limitations is ground only for a modification of the judgment, by proper reduction thereof, and not for a reversal thereof, merely because of the inconsistency of such item with other findings.

ID.—JUDGMENT PARTLY SATISFIED—EFFECT OF AFFIRMANCE.—The affirmance of a judgment will not affect the fact that it has been partly satisfied.

ACTION FOR GRAPES SOLD AND DELIVERED—WRITTEN CONTRACT—TIME OF PAYMENT—ALLOWANCE OF INTEREST.—In an action for grapes sold and delivered, where the price of the grapes is fixed by a written contract, pleaded in the answer, and the amount of recovery is capable of being made certain by calculation, the plaintiff, in a judgment based upon the contract, is entitled to recover interest from the time fixed in the contract for payment; and it is proper to look to the contract to determine the allowance of interest.

ID.—EVIDENCE—LETTER OF DEFENDANT TO PLAINTIFF'S BROTHER.—A letter written from the defendant to the plaintiff's brother and received by him in due course of mail, relating directly to the claim upon which the action is based, is admissible against the defendant; and the brother, in connection with its admission, may be asked if he had any personal claim against the defendant.

ID.—LETTER MISDIRECTED TO PLAINTIFF'S BROTHER—REFERENCE TO PLAINTIFF'S LETTER.—A letter from defendant intended for the plaintiff and referring to a letter received by defendant from plaintiff, which was by mistake of defendant's wife, acting as his secretary, misdirected to plaintiff's brother, is properly admitted in evidence against the defendant.

APPEAL from a judgment of the Superior Court of Santa Clara County. W. G. Lorigan, Judge.

The facts are stated in the opinion.

J. B. Kerwin, and Francis J. Heney, for Appellant.

H. E. Wilcox, and D. M. Burnett, for Respondent.

GRAY, C.—By reference to the notice of appeal herein we find that on the twenty-second day of October, 1897, the defendant appealed from a judgment entered in plaintiff's favor on the twenty-fifth day of March, 1897. At the same

time defendant also appealed from an order denying him a new trial, which latter appeal was on motion of plaintiff heretofore dismissed by this court.

The action is brought to recover an amount alleged to be due for some grapes sold and delivered by plaintiff to defendant. It appears that the sale was made under a written contract, signed by plaintiff and defendant, which is contained in the answer, repeated in the findings, and reads as follows, to wit:

“Mount Cabernet Vineyard, Cupertino, June , 1892.

“This agreement is to certify that I have sold to R. Heney, Jr., my Cabernet wine grape crop, vintage of 1892, at twenty dollars per ton. Payment to be made one year from average date of delivery. Said grapes to be delivered at his winery in good condition and to contain not less than twenty-four per cent saccharine, and are to be picked and delivered in the order desired from day to day.”

The court finds that between October 10 and November 12, 1892, the plaintiff delivered to defendant under and according to the terms of said written contract 53.5435 tons of Cabernet wine grapes, and that the amount due therefor was and is \$1,070.87. The court further finds that the twenty-fifth day of October, 1892, was the average date of delivery as provided in said written contract; that there was paid by defendant to plaintiff \$118, as part payment of the purchase price of the said grapes delivered under said written contract as aforesaid. It is also found that there is due from defendant to plaintiff \$115.48 for grapes (not of the Cabernet variety) sold and delivered between October 10 and November 12, 1892.

It is further found that plaintiff is entitled to judgment against the defendant for \$1,068.35, together with interest thereon from the twenty-fifth day of October, 1893, at seven per cent per annum; and judgment was accordingly entered on March 25, 1897, for \$1,323.86, with interest at seven per cent per annum from date of the judgment, and for costs. Thereafter a motion for a new trial was made by defendant, and the trial court being of opinion that the item of \$115.48 was barred by the statute of limitations, such

proceedings were thereon had that to avoid the granting of a new trial the plaintiff duly remitted from the judgment and acknowledged satisfaction thereof to the extent of \$143.08, being the said item of \$115.48, with the interest thereon. The satisfaction of the judgment to the above extent was thereupon, by order of the court, duly entered, and the motion for a new trial was denied.

1. We cannot review the evidence to ascertain whether it supports the findings, for the reason that the notice of appeal shows that the appeal was taken from the original judgment more than sixty days after entry thereof, and there is no appeal here now from any modification of said judgment nor from any order made subsequent to the entry of said judgment.

2. But appellant insists that the findings do not support the judgment appealed from for the reason: 1. That the findings are inconsistent and on their face show that the item of \$115.48 is barred by the statute of limitations; and 2. No interest should have been allowed. It does not appear from the findings whether the said item of \$115.48 sprung from a written or oral contract, and there is, therefore, nothing in the other findings inconsistent with the eighth, which expressly finds that plaintiff's cause of action is not, nor is any part thereof, barred by the statute of limitations. The findings show that the item claimed to be barred accrued within four years prior to the commencement of the action; it could be barred, then, only in case it was not based upon a written contract, and from the fact that the court finds that it is not barred, we must presume that it arose out of a written contract. But aside from all this, if the item complained of were shown by the findings to be barred by the statute of limitations, the remedy would be a modification of the judgment by reducing it in the amount of said item and the interest thereon. This has already been done in effect by the trial court on the stipulation of the respondent and by the consent of the appellant, as appears from the record laid before the court on this appeal by the appellant himself.

It is plain that the plaintiff was entitled to interest on the amount found to be due under the written contract, because the price of the articles sold was fixed in the contract and the amount that plaintiff should recover was capable of being

made certain by calculation, and the right to recover this certain amount was vested in plaintiff on a particular day, to wit, October 25, 1893. (Civ. Code, sec. 3287.) The judgment in plaintiff's favor, so far as it has not been satisfied, is based upon the written contract set up in the answer, and therefore it is proper to look to that contract to determine whether interest should be allowed.

3. The letter, Exhibit "D," purporting to be written by defendant to plaintiff's brother, dated January 31, 1896, and received in due course of mail, was shown to relate directly to the claim upon which this action is based. The objection to it, "that it refers to an entirely different account and addressed to an entirely different person," was, therefore, properly overruled.

The question of J. R. Ryland, the brother of plaintiff, as follows, "Now, in connection with this, did you have any account personally with Mr. Heney, Jr.?" was asked for the purpose of showing, in connection with further questions and answers, that the letter, Exhibit "D," received by the witness from defendant, related to defendant's contract with the plaintiff, and the question was evidently intended to obviate the objection that had been made to the introduction of the said letter. There is no merit in the objection to the quoted question.

It was shown by the evidence that the defendant's wife was his secretary; that she answered the letters that came to him, sometimes at his dictation, at other on her own motion, in his absence signing his name thereto; that she wrote and signed her husband's name to the letter of April 3, 1896, Exhibit "F," in reply to one from plaintiff addressed to defendant and received by her on that date during the temporary absence of her husband in San Jose for a portion of the day; that the defendant subsequently received a reply to the said letter of April 3d, and his wife also told him of having written it on the receipt of this reply. Thereafter, as we understand the evidence, the defendant dictated to his wife a letter of date April 15, 1896, Exhibit "E," intended by him to be sent to the plaintiff, but by some mistake his wife wrote and addressed it to plaintiff's brother, J. R. Ryland, who, it appears, was acting as agent in the matter for plaintiff. This letter of April 15th was introduced in evidence by plaintiff without objection on the part of de-

fendant; it purports to be signed by defendant, and in it reference is made to the letter of April 3d, Exhibit "F," and part of the contents of said Exhibit "F" is therein repeated, and it is distinctly referred to as emanating from defendant. We therefore hold that the letter of April 3d was properly admitted in evidence.

Affirming the judgment appealed from will not alter the fact that said judgment has been in part satisfied. We therefore advise that said judgment be affirmed.

Smith, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Van Dyke, J., Harrison, J., Garoutte, J.

Hearing in Bank denied.

[S. F. No. 1663. Department Two.—November 7, 1900.]

SARAH L. PHILLIPS, Respondent, v. SANGER LUMBER COMPANY, Appellant.

CORPORATIONS—UNAUTHORIZED NOTE—RATIFICATION.—A promissory note of a corporation, executed in its name by its president, for a valuable consideration, to another corporation of which he was also the president and a large stockholder, although not formally authorized by a resolution of the board of directors, may be subsequently ratified by the corporation so as to become a valid obligation against it. And such ratification is shown, if the transaction in connection with which the note was given is fully entered in the books of the corporation, and notice thereof thus imparted to it, and thereafter for a space of seven months the corporation takes no steps to disaffirm the note, and retains the consideration for which it was given.

Id.—NOTE TO PRESIDENT—VOIDABLE CONTRACT—RESCISSION—RETURN OF CONSIDERATION.—Where the president of a corporation has the power to execute notes in its name, a note so executed by him, for a valuable consideration moving to the corporation, in a transaction in which he has an interest adverse to it, is not void, but voidable only at the option of the corporation. The right of the corporation in such a case is merely the right to rescind, and this it cannot do without restoring the consideration for the note.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion.

Charles E. Wilson, and R. E. Houghton, for Appellant.

The note in question is invalid, for the reason that one acting in a fiduciary capacity cannot take any advantage personal to himself from his administration of the subject of the trust. (Civ. Code, secs. 2230, 2234; *Farmers' etc. Co. v. San Diego etc. Co.*, 45 Fed. Rep. 527; *Wickersham v. Crittenden*, 93 Cal. 17; *Ryan v. Leavenworth etc. Ry. Co.*, 21 Kan. 397, 398; *Wilbur v. Lynde*, 49 Cal. 292¹; *Goodin v. Cincinnati etc. Canal Co.*, 10 Ohio St. 183²; *Flint etc. Ry. Co. v. Dewey*, 14 Mich. 488; *Corbett v. Woodward*, 5 Saw. 404; *Bliss v. Matteson*, 45 N. Y. 26; *Abbott v. American Hard Rubber So.*, 33 Barb. 578; Morawetz on Private Corporations, secs. 517, 518.)

Van Ness & Redman, for Respondent.

SMITH, C.—The suit was brought for the sum of two thousand dollars and interest, alleged to be due on a promissory note, of date November 30, 1895, made by the defendant to the Moore & Smith Lumber Company, and assigned by the latter to Frances J. P. Moore, and by her to the plaintiff. There was a verdict and judgment for the plaintiff, and the defendant appeals.

No claim is made by the respondent to any right of recovery as assignee beyond that vested in the original payee. The note was signed by the president of the defendant, A. D. Moore, who was at the same time the president and a large stockholder of the Moore & Smith Lumber Company, the payee. There was no resolution of the board of directors of the defendant especially directing or authorizing the making of the note. The principal points urged by the appellant for reversal are (1) that the president had no power to execute the note; (2) that he was precluded by his interest in the Moore & Smith Lumber Company from dealing in the trans-

¹ 19 Am. Rep. 645.

² 98 Am. Dec. 95.

action; and (3)—in answer to the respondent's claim that the transaction was subsequently ratified—that there was no such ratification. In the view we take of the case it will be necessary to consider only the last proposition.

The note sued on, and two others made in the same transaction, were given for valuable consideration received by the defendant; and the whole transaction was entered at large in the books of the defendant, where its nature and terms fully appear. During the period of something over seven months elapsing before the bringing of the suit—though in the meantime the note was presented for payment—no objection was made to the note, nor was there any attempt or offer to rescind; nor is there any offer in the answer to restore the consideration. The position of the defendant is, in effect, that it is entitled to retain the benefits of the transaction, and to repudiate its obligations. Under no view of the case can this contention be sustained.

If Moore, as president, had the power to execute the notes, it was not affected by the interest he had in the Moore & Smith Lumber Company, the payee. A trustee or fiduciary is, indeed, forbidden by section 2230 of the Civil Code to take part in any transaction in which he, or one for whom he acts as agent, has an interest adverse to that of his beneficiary; and by section 2234 for him to do so is a fraud against the beneficiary of the trust. But assuming, though not deciding, that the case comes within the scope of these provisions, they do not affect the power to execute the contract, where otherwise it exists, but only the contract itself after it is executed; that is to say, they do not make the contract void, but voidable only at the option of the beneficiary, who may either affirm or repudiate it. (*Wickersham v. Crittenden*, 93 Cal. 29.) The right of the beneficiary in such cases is, therefore, merely the right to rescind; and to effect this he must restore the consideration. He cannot retain the benefits of the transaction and repudiate its obligations. (Civ. Code, sec. 1691.) If, therefore, after knowledge of the transaction he does not elect to terminate the contract, he must be regarded as ratifying and confirming it. (Civ. Code, secs. 1588, 1589.)

Nor will the result be changed if we assume that there was

no authority originally for the execution of the note. An agency may be created by subsequent ratification as well as by precedent authority (Civ. Code, sec. 2307); and where an oral authorization would suffice for conferring an agency, it will be ratified by accepting or retaining the benefit of the act with notice thereof. (Civ. Code, sec. 2310.) The case here comes clearly within these provisions. Oral authority is sufficient to create an agent to execute a note or notes (1 Daniel on Negotiable Instruments, sec. 274.; and this is equally true in the case of corporations as of natural persons. (Waterman on Corporations, sec. 30; *Greig v. Riordan*, 99 Cal. 322; *Crowley v. Genesee Co.*, 55 Cal. 273.) The transaction in this case was fully entered in the books of the defendant, and notice thus imparted to it. (1 Waterman on Corporations, 480; *Holden v. Hoyt*, 134 Mass. 184.) After such notice it retained the consideration of the transaction, and thus accepted its benefits. It must therefore be held to have ratified the transaction.

There are numerous points made by the appellant's counsel, which we have examined in detail, but, otherwise than as involved in the points above considered, they may be regarded as immaterial.

I advise that the judgment and order appealed from be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Henshaw, J., McFarland, J., Temple, J.

[S. F. No. 1576. Department One.—November 8, 1900.]

NANCY GREEN, Respondent, v. PACIFIC LUMBER
COMPANY, Appellant.

RAILROAD COMPANY—OPERATION OF OPPOSING TRAINS—GROSS NEGLIGENCE.—A railroad company operating a single track so that two trains are running thereupon in opposite directions at the same time, so as to threaten a collision, is guilty of gross negligence.

1d.—ESCAPE OF PASSENGER TO AVOID THREATENED COLLISION—RESULTING INJURY—CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.—A lady passenger, who jumped with other passengers from a train going from eight to ten miles per hour, under an apprehension of great danger from collision with a freight train, discovered to be rapidly approaching from around a curve toward the passenger train, and fell face downward upon the track, from which she rolled to escape being run over, and was carried down an embankment, to her serious injury, cannot be charged with contributory negligence, as matter of law; but it is essentially a question of fact whether her acts were justified in view of all the surrounding circumstances.

1d.—RESPONSIBILITY OF RAILROAD COMPANY—ESCAPE OF PASSENGERS CAUSED BY PERILOUS OPERATION OF TRAINS.—If a railroad company so operates its trains as to place its passengers in situations apparently so dangerous and hazardous as to create in their minds a reasonable apprehension of peril and injury, and thereby excite their alarm and induce them to make efforts to escape, and if, in such efforts to escape, they receive personal injuries, the railroad company is responsible in damages for its negligence.

1d.—ALIGHTING OF PASSENGER IN DANGEROUS SPOT.—The fact that a passenger, in the hurry and excitement of an attempt to escape from the peril of a threatened collision of trains, alights upon an unsafe and dangerous spot, will not, of itself, necessarily defeat a right of recovery, although a safe and secure spot was at hand and equally ready of access.

1d.—PLEADING AND EVIDENCE—CHARGE OF BEING "THROWN UPON TRACK"—PROOF OF SINGLE ACT—EVIDENCE NOT OBJECTED TO.—Under a count in the complaint averring that plaintiff, "in her effort to escape from said car and avoid probable injury and death, was thrown with great violence and force upon the track of defendant's railroad, and was greatly and severely injured," proof may be given of her jumping from the train, her falling or being thrown upon the track, and her rolling from the track down the embankment, which may be regarded as a single act whereby she was injured, filling the measure of the averment, especially where the evidence was not objected to as not being within the pleadings.

ID.—REFUSAL OF INSTRUCTION—APPLICABILITY TO ONE COUNT, AND NOT TO ANOTHER.—Where the complaint in the first count alleged that the injury was the result of a collision of the trains, but in the second count alleged that it resulted from an escape from the car to avoid peril of death from the threatened collision, in which she was thrown upon the track with violence to her injury, the cause of action in the second count in no way depends upon an actual collision; and a requested instruction that plaintiff cannot recover unless she has proved by a preponderance of evidence that the collision caused her injury is properly refused.

ID.—INJURY RESULTING TO PASSENGER—PRIMA FACIE CASE—BURDEN OF PROOF UPON CARRIER.—Evidence that plaintiff was a passenger in defendant's car, and was injured as the result of the operation by the defendant of colliding trains, makes a *prima facie* case against the defendant. The burden of proof is then thrown upon the defendant, as a carrier of passengers, to overcome such *prima facie* case; and if such burden is not sustained, the verdict should be for the plaintiff.

ID.—CRUDENESS OF TRAIN—RIGHTS OF PASSENGER NOT WAIVED—RESPONSIBILITY OF CARRIER.—The plaintiff by riding as a passenger for hire in a car which, with the locomotive attached, was a crude affair, waived none of her rights as a passenger. The defendant, in transporting her as a passenger for hire, was subject to all of the rules of law which bind common carriers of passengers; and the plaintiff was entitled to the same care of the defendant for her safety as though she were a passenger upon a Pullman train.

ID.—EVIDENCE—COMPLAINTS OF PAIN AND SUFFERING TO NURSE—EXPERT—HEARSAY.—Evidence that during the first week after the injury of the plaintiff she made complaints of pain and suffering to the nurse attending upon her is admissible. It involves no principle of expert evidence, and is not objectionable as hearsay.

ID.—DECLARATIONS INDICATIVE OF PRESENT PHYSICAL CONDITION.—Involuntary declarations and exclamations indicative of a present physical condition are competent evidence as distinguished from objectionable declarations, only amounting to the statement of a past condition.

APPEAL from a judgment of the Superior Court of Humboldt County and from an order denying a new trial. E. W. Wilson, Judge.

The facts are stated in the opinion of the court.

S. M. Buck, for appellant.

Plaintiff was bound to establish her case as alleged, which she did not do. (*Mondran v. Goux*, 51 Cal. 151; *Heinlen v.*

Heilbron, 71 Cal. 563; *Shenandoah etc. Co. v. Morgan*, 106 Cal. 417; *Elmore v. Elmore*, 114 Cal. 519; *Waldhier v. Hannibal etc. Ry. Co.*, 71 Mo. 514; *Marquette etc. R. R. Co. v. Marcott*, 41 Mich. 435; *Batterson v. Chicago etc. Ry. Co.*, 49 Mich. 184; *Chicago etc. R. R. Co. v. Lee*, 68 Ill. 576; *Manuel v. Railroad Co.*, 56 Iowa, 655.) The evidence shows that the injury was the result of plaintiff's own negligence. (*Baltimore etc. R. R. Co. v. Boteler*, 38 Md. 568.) The evidence of the nurse was not admissible, such evidence being confined to skilled physicians, or to declarations made immediately after the accident. (*Barber v. Merriam*, 11 Allen, 324, 325.)

J. H. G. Weaver, and W. F. Clyborne, for Respondent.

All injuries resulting by reason of the defendant's negligence, though remotely occasioned, are recoverable. (*Brown v. Chicago etc. Ry. Co.*, 54 Wis. 342.¹) There was no variance between the pleading and proof; and no objection having been taken to the evidence in support of the complaint, objection cannot be raised thereto upon appeal for the first time. (*Stockton Combined Harvester etc. Works v. Glenn Falls Ins. Co.*, 121 Cal. 167; *Elmore v. Elmore*, 114 Cal. 519.) The complaints of pain and suffering made to the nurse in attendance upon plaintiff were admissible. (*Bridge v. Oshkosh*, 71 Wis. 363, and cases cited.) The instructions given were correct; and the instructions refused were incorrect. The question of contributory negligence was properly left to the jury.

GAROUTTE, J.—This is an action to recover damages for personal injuries. Defendant appeals from the judgment and order denying a motion for a new trial. Defendant was engaged in the lumber business, and in connection therewith operated a railroad. Plaintiff was a passenger upon this railroad, traveling from the town of Scotia to Alton. The railroad was a single track road, and between these two points, while the train was going at the rate of eight or ten miles an hour, an approaching freight train disclosed itself in front, a few hundred feet distant, as it emerged from around a curve. A collision seemed certain, and the plaintiff, as

¹ 41 Am. Rep. 41.

well as others upon the train, escaped therefrom to the ground. In her efforts to escape the threatened danger she jumped or stepped from the train, fell upon the track, and rolled down an embankment, suffering great personal injuries. Various questions are raised by this appeal upon the giving and refusing of certain instructions as to the law, and some rulings upon the admission and rejection of evidence are also assailed.

It may be conceded that when the defendant attempted to operate two trains upon a single track at the same place and time, and traveling in opposite directions, it was guilty of gross negligence. But defendant now insists that plaintiff was guilty of contributory negligence, first, in this: that if she had not jumped from the train she would not have been injured, and, *ergo*, she should not have jumped; and, second, that after having jumped she should not have fallen and rolled down the embankment. When a passenger upon a railroad train observes a second train upon the same track a few hundred feet distant, the two trains rapidly approaching each other, danger is right at his elbow, and it behooves him to do something and do it quickly. There is no time to enter into mental calculations, mathematical or otherwise, as to whether or not it is best to stand your ground and trust to some advertment of the collision, or, upon the contrary, attempt to escape from the scene of the danger at the quickest possible moment. And the law recognizes that under these circumstances a man may do the wrong thing, his act thereby resulting in an injury to himself, and yet not be held guilty of contributory negligence. This principle of law may be thus stated: "If a railroad company so operates its trains as to place its passengers in situations apparently so dangerous and hazardous as to create in their minds a reasonable apprehension of peril and injury, and thereby excite their alarm and induce them to make efforts to escape, and if in such efforts to escape they receive personal injuries, it is responsible in damages for its negligence." Under the circumstances of this case, tested by this principle of law, it was essentially a question of fact for the jury as to whether or not plaintiff was justified, in view of all the surrounding conditions, in jumping from the train.

The same principle of law may be invoked upon the second contention made as to contributory negligence. If the danger of collision is hanging right over a passenger's head, the proprieties and niceties usually demanded of passengers in alighting from trains certainly need not be observed to their full extent. Under those circumstances a person does not stand and ponder upon the order of his going, but goes at once. A safe or unsafe spot may be chosen upon which to alight from the car. If the spot be unsafe and dangerous, that fact, of itself, will not necessarily defeat a right of recovery, even though a safe and secure spot was at hand and equally ready of access. The plaintiff testifies that in jumping from the train she fell upon the track face downward, that danger still threatened her there as the cars were liable to pass over her, and in rolling from the track she was carried down the embankment. This court will not hold, as matter of law, that her acts, under the circumstances detailed, amount to contributory negligence.

The complaint in this case is composed of three counts. The second count is to the effect that by reason of the threatened collision of the two trains, and fearing greater danger therefrom, said plaintiff, "in her effort to escape from said car and avoid probable injury and death, was thrown with great violence upon the track of defendant's railroad and was greatly and severely injured." Whatever may be said as to the insufficiency of the evidence to support the other counts of the pleading, there can be no question but that the evidence is sufficient to support the count to which we have referred. The jumping from the train by reason of the threatened collision, the falling or being thrown upon the track, and the rolling from the track down the embankment, may be grouped as a single act, and it fairly fills the measure demanded by the allegation in the count to the effect that in escaping from the train she "was thrown upon the track and injured." Especially is this true when we consider that all this evidence went to the jury without a single objection to the effect that it was not within the pleadings.

Complaint is made of the refusal of the court to give an instruction, which, among other matters, contained the following language: "I call your particular attention to these allegations of the complaint, and charge you that unless

the plaintiff has shown by a preponderance of evidence that her injury was the result of a collision, then your verdict must be for defendant. In other words, the plaintiff having alleged in her complaint that the collision caused her injury, it is necessary that she should prove such allegation precisely as made; and in case of failure to do so, plaintiff would not be entitled to recover, even though the jury believed that defendant was negligent." The instruction was properly refused, for, as we have seen, the second count of the complaint contains no claim that the injury to plaintiff was directly occasioned by the collision. It was the attempt of plaintiff to escape from the threatened collision which resulted in her injury. The cause of action set out in the second count of the complaint in no way depended upon an actual collision of the two trains, and that count would have been equally as meritorious if no collision had ever taken place.

Defendant claims that it was "damaging" error to give the following instruction: "In this case all that is necessary for plaintiff to prove in the first instance is that she was a passenger in defendant's car; that said car came into collision with one of defendant's trains, while they were being run by defendant; and that the injuries of plaintiff resulted by reason thereof. This establishes a *prima facie* case against the defendant. The burden of proof is then thrown upon defendant, . . . and if defendant has failed in this they should find for plaintiff." This instruction contains a sound elementary principle of law applicable to common carriers, and no objection can be made to it. We have also examined with care the other instructions given and refused by the trial court, and find no valid objection to its action in dealing with them.

The witness who acted as a nurse for plaintiff during the first week after her injuries were received, was asked the following question: "You may state any complaints of pain and suffering which you heard." The objection to this question upon the ground that the witness was not an expert amounts to nothing. No principle of expert evidence is involved in the question. Neither do we consider the evidence objectionable as hearsay. Involuntary declarations and exclamations of a person's present pain and suffering are admissible as tending in some degree to show his physical con-

dition. Of course, when these declarations only amount to statements of his past condition they should be rejected. (*Bride v. Oshkosh*, 71 Wis. 363; *Will v. Mendon*, 108 Mich. 251.) The question here proposed comes fairly within the true rule of law and was proper. If the answer was too broad, as unresponsive to the question, the remedy of appellant is found in a motion to strike out. In view of the serious injury suffered by plaintiff as a result of the accident, the question and answer, as far as they were relevant, were matters of very minor importance under any circumstances. Regarding the testimony of Dr. Felt, the motion to strike out the answer of the witness came too late, even if it be conceded that the question was an improper one.

The car with the locomotive attachment upon which plaintiff was riding at the time of the accident was a crude affair. And it is now claimed by defendant that plaintiff, in riding upon such a train, waived certain rights to which she might have been entitled if riding upon an ordinary passenger train. The claim that plaintiff was extended the privilege of riding in the car is of no force. Defendant, in running this car, carried passengers for hire. Plaintiff paid her fare, and defendant was a common carrier in transporting her, subject to all the rules of law which bind a common carrier of passengers in the performance of its duty. Plaintiff waived no rights, and was entitled to the exercise of the same care upon the part of defendant, looking to her safety, as though she had taken passage upon a Pullman train. We find no error in the instructions bearing upon this branch of the case.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

[S. F. No. 1598. Department Two.—November 8, 1900.]

THE PEOPLE ex rel. BOARD OF STATE HARBOR COMMISSIONERS, Respondent, v. PACIFIC IMPROVEMENT COMPANY et al., Appellants.

BOARD OF STATE HARBOR COMMISSIONERS—JURISDICTION OVER CHANNEL STREET—EBB AND FLOW OF TIDE WATER.—The act of March 15, 1878, which specially extends the jurisdiction of the board of state harbor commissioners in and over Channel street, "as far as the ebb and flow of tide water," is not to be construed as confining their jurisdiction to that portion only of Channel street where the tide ebbs and flows, but as extending it as far as the tide ebbs and flows and to all parts of Channel street.

ID.—ACTION OF EJECTMENT—PLEADING—ADMISSION.—The commissioners are authorized by section 2523 of the Political Code, taken together with section 2524 of the same code and the act of 1878, to bring an action of ejectment in the name of the people, to recover possession of a strip of land in Channel street over which the tide ebbs and flows; and where the verified complaint alleges that the tide ebbs and flows over the premises in controversy, and the allegation is not denied, it cannot be claimed by the defendant that the land is separated from the canal by a bulkhead, and that the tide does not ebb and flow over it.

ID.—ACT OF 1878 NOT REPEALED BY IMPLICATION.—The act of 1878, providing that "the inshore limit of the jurisdiction of the board of state harbor commissioners shall be and remain the same as defined in section 2524 of the Political Code," and specially extending their jurisdiction in and over Channel street "as far as the ebb and flow of tide water," is not repealed by implication as to the latter provision by the subsequent amendments of 1887 and 1889 to section 2524 of the Political Code, there being no radical inconsistency between these amendments and that special provision of the act of 1878 which can still stand and be read as a part of that section as amended, and as a proviso thereto.

CONSTRUCTION OF STATUTES—REPEAL BY IMPLICATION NOT FAVORED.—

The law does not favor a repeal by implication, and where there are two or more provisions in relation to the same subject matter, they must, if possible, be construed so as to maintain the integrity of both; and the repugnancy between them should be very clear to sustain a repeal by implication.

ID.—SPECIAL AND GENERAL STATUTES.—Where a special and a general statute treat of the same subject, the special act will control as to its special provisions, and will not be deemed repealed by implication

by a later general statute, although the terms of the general statute, taken strictly, would include the terms of the special statute, if they are not irreconcilably inconsistent, and if there is no manifest intention of the legislature to repeal or alter the special statute.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion.

J. E. Foulds, for Appellants.

The re-enactment of section 2524 of the Political Code in 1887, omitting all reference to the proviso contained in the act of 1878, repealed that proviso. (*Camley v. Stanfield*, 10 Tex. 546¹; *State v. Wilson*, 43 N. H. 415.²) Under the rules of construction the legislature must have had in mind the act of 1878, and to have intended the repeal of that proviso, as inconsistent with the re-enacted statute omitting it. (Sutherland on Statutory Construction, 137, 179, 180, 184, 185, 222, 371, 419.) Section 2523 of the Political Code does not authorize this action. An action upon the relation of the harbor commissioners is not a proper remedy for a purpresture. (13 Am. & Eng. Ency. of Law, 939, 940.)

Tirey L. Ford, Attorney General, for Respondent.

The provisions of a former statute referred to in a later special statute which operates as a proviso thereof are to be deemed embodied in the special statutes, and any subsequent change of the former statute cannot change the special statute or operate to repeal it. (*People v. Whipple*, 47 Cal. 593; *Ventura County v. Clay*, 112 Cal. 65; *Turney v. Wilton*, 36 Ill. 385; Sutherland on Statutory Construction, sec. 257.) The action of ejectment in the name of the people on relation of the harbor commissioners was the proper remedy. (Pol. Code, secs. 2523, 2524; Act of 1878, p. 263; *People v. La Rue*, 95 Cal. 77; *People v. Davidson*, 30 Cal. 379; *San Francisco v. Calderwood*, 31 Cal. 591³; *Coburn v. Ames*, 52 Cal. 397.⁴) A special law is to be read with a general law,

¹ 60 Am. Dec. 219.

² 82 Am. Dec. 163.

³ 91 Am. Dec. 542.

⁴ 28 Am. Rep. 634.

and to be considered specially effective where the provisions are different. (*Talcott v. Harbor Commrs.*, 53 Cal. 199.)

COOPER, C.—This action was brought by the board of state harbor commissioners, in the name of the people of the state of California, to recover possession of a strip of land thirty feet wide lying along the southerly side of Channel street, in the city and county of San Francisco, and constituting a portion of said street, the same being located west of the east line of Fifth street. Defendants filed a demurrer to the complaint, which was overruled, and thereupon they filed an answer. It was agreed that the case be submitted upon the pleadings, and that findings be waived. The court thereupon ordered judgment for plaintiff, and this appeal is from the judgment on the judgment-roll.

The main controversy is as to whether the premises described in the complaint are part of the territory over which the jurisdiction of the state board of harbor commissioners extends. The solution of the question depends upon the construction of certain acts of the legislature. Prior to March 15, 1878, the territory subject to the jurisdiction of the said board was described by section 2524 of the Political Code, and did not include the premises in controversy. The language of the section, as to the portion of the description of Channel street, was: "Thence southerly along the center of Third street, to the northerly line of Channel street; thence westerly, along the last-mentioned line, to the easterly line of Fifth street; thence southerly, along said last-mentioned line, to the southerly line of Channel street; thence easterly, along said mentioned line, to the center of Kentucky street."

There is no claim that the premises were included within the descriptive calls of said section, or within the jurisdiction of the board, prior to the said fifteenth day of March, 1878. On the last-named date the legislature passed an act entitled "An act concerning the waterfront of the city and county of San Francisco." (Stats. 1877-78, p. 263.) This act provided: "The inshore limit of the jurisdiction of the board of state harbor commissioners shall be and remain the same as defined in section 2524 of the Political Code. . . .

But their jurisdiction in and over Channel street shall extend as far as the ebb and flow of the tide water."

The act further provided that Channel street, as far as the ebb and flow of the tide, was "dedicated to public use for the purposes of commerce and navigation, and shall be subject to the jurisdiction of the said commissioners."

This act has never been expressly repealed and remains in full force unless it has been repealed by implication.

By an act approved March 21, 1887 (Stats. 1887, p. 224), section 2524 of the Political Code was amended and certain additional authority given to the board as to repairing wharves and piers and purchasing and constructing pile-drivers. In this amendment the description of the premises over which the board had jurisdiction was given as in the section prior to the act of March, 1878. The evident purpose of the amendment was to give additional powers to the board. The act of March, 1878, was in no way referred to.

The section was again amended March 19, 1889 (Stats. 1889, p. 380), and the description apparently copied from the old section without any reference to the act of March, 1878. This latter amendment was for the apparent purpose of giving the board certain other powers, and restricting their powers as to leasing, and prohibiting railroad companies from laying down tracks upon the property over which the board has jurisdiction. In both the amendments—of 1887 and 1889—the description is given as in the original section prior to March, 1878. In neither is there any reference to the act of March, 1878, nor anything said about any repeal of any act or section. The section as amended after the act of March 15, 1878, is no more in conflict with the said act than it was when the act was passed. The act of March, 1878, added to the territory over which the board had jurisdiction the premises in controversy. It was to be read in connection with section 2524 of the Political Code, and as an enlargement of the jurisdiction originally given by that section. We do not think it was the intention of the legislature to repeal the act of March, 1878, neither do we think it has done so. It is not contended that there is any express repeal nor any inconsistency. It is the established rule of construction that the law does not favor a repeal by implication, but

that where there are two or more provisions relating to the the same subject matter they must, if possible, be construed so as to maintain the integrity of both. It is also the rule that where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as coming within its particular provisions. A special statute providing for a particular place, or applicable to a particular locality, is not repealed by a statute general in its terms and application unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would, taken strictly and but for the special law, include the case or cases provided by it. (*Bateman v. Colgan*, 111 Cal. 586.) It is said by Judge Cooley (*Cooley's Constitutional Limitations*, 6th ed., 182): "The repugnancy between two statutes should be very clear to warrant a court holding that the one later in time repeals the other, when it does not in terms purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never to be deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect."

In this case the special act added to the description the portion of Channel street where the tide ebbs and flows. No change was attempted in the amendments to the section as to the description. The special act can still stand and can be reconciled with, and read as a part of, the section amended. "Provided that the jurisdiction shall extend to that portion of Channel street as far as the ebb and flow of tide water" may be considered as a part of, and in no way inconsistent with, the section.

In amending section 2524 the legislature, in copying the whole section, were only following the plain mandates of the constitution: "No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended." (Const., art. IV, sec. 24.) The views herein expressed are in accord with the construction of similar acts heretofore given by this court.

In *People v. Tyler*, 36 Cal. 524, it appeared that the fif-

teenth section of the judiciary act of 1863 provided that "there shall be held in the several counties of this state terms of the county courts, commencing on the first Monday of January, March, May, July, September, and November of each year." In 1864, by a special act, Nevada county was exempted from the provisions of the act and different dates provided for holding court in said last-named county. In 1868 another act was passed amending section 15 of the original act so as to read: "There shall be held in the several counties of this state terms of the county court, commencing on the first Mondays of January, March, May, July, September, and November in each year," which was followed by a proviso as to other matters not in the section as it originally stood.

It was contended that the act of 1868 applied to all the counties of the state and included Nevada county, concerning which the special act was passed. This court held that the special act as to Nevada county was not repealed, and in the opinion said: "The amendment does not purport to extend its application, but to amend a provision of the act itself, which would thenceforth extend to those courts only to which the act itself was before applicable. The object of the amendment is sufficiently apparent upon comparing section 15 as it stood before with the section as it stood after the amendment. It will be found that the section, as amended, is a *verbatim* copy of the former section, with a proviso added," etc.

April 1, 1880, the legislature amended section 259 of the Code of Civil Procedure, giving court commissioners power to take acknowledgments and proof of deeds, mortgages, and other instruments. Three days afterward the same legislature amended section 1181 of the Civil Code by providing that acknowledgments in this state may be made before: "1. A clerk of a court of record; or 2. A county recorder; or 3. A notary public; or 4. A justice of the peace." The words "a court commissioner" were omitted from the original section by the amendments. In *Malone v. Bosch*, 104 Cal. 683, it was claimed that the amendment to the section of the Civil Code repealed by implication the section of the Code of Civil Procedure as to the power of a court commissioner to take acknowledgments, but the court held there was no repeal

and that both sections remained in force. In the opinion it is said: "Repeal by implication is not favored, and the conflict must be irreconcilable, or the intent to repeal very manifest, or both statutes will stand. I see no conflict in the statutes. The fact that court commissioners may take acknowledgments does not interfere with the provisions of the Civil Code." It is claimed that there is a canal through the center of Channel street west of Fifth street, and that the tide only ebbs and flows in the canal, and not on the land in controversy, which it is claimed is outside the canal and separated from it by a bulkhead. The language of the act of 1878 does not confine the jurisdiction of the board to the portion only of the street where the tide ebbs and flows, but the jurisdiction extends as far as the tide ebbs and flows and to all parts of the street. But aside from this the complaint, which is verified, alleges that the tide ebbs and flows over the premises in controversy, and this allegation is not denied.

The board had the authority to bring the action under section 2523 of the Political Code. This section expressly gives it authority to bring actions for the possession of any portion of the premises described in this article. (*People v. La Rue*, 95 Cal. 75.)

The act of March, 1878, placed the premises sued for as within the description of the article. There is no attempt to describe the territory over which the board has jurisdiction in section 2523, but the description is fully given in section 2524 and the act of March 15, 1878. The latter act expressly states that the premises shall be subject to the jurisdiction of the board as provided in the Political Code.

If what has been said is correct, it follows that the judgment should be affirmed.

Smith, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Temple, J., Henshaw, J.

[Crim. No. 591. In Bank.—November 8, 1900.]

THE PEOPLE, Respondent, v. W. E. RUSHING, Appellant.

CRIMINAL LAW—FORGERY—UTTERING FALSE AND FORGED POWER OF ATTORNEY—FRAUDULENT SALE OF BANK ACCOUNT.—A power of attorney to the defendant executed by Elmer Geddes, under the name of "E. Geddes," with intent that it should thereby bind and represent Edwin Geddes, for a fraudulent purpose, is false and forged; and the uttering thereof by the defendant by signing the name "E. Geddes, by his attorney in fact, W. E. Rushing," to an assignment of a bank account kept in the name of "E. Geddes," by Edwin Geddes, upon a sale thereof at a discount, with intent to defraud the purchaser, and with guilty knowledge of all the facts, constitutes the crime of forgery by the defendant under section 472 of the Penal Code.

ID.—FORGERY IN SIGNING ONE'S OWN NAME.—One may be guilty of forgery in signing one's own name to an instrument with the fraudulent intent of making the instrument appear to bind another, and of making the writing to be the writing of another bearing the same name, or the same family name and initial.

ID.—FRAUDULENT INTENT AND GUILTY KNOWLEDGE OF DEFENDANT—SUPPORT OF VERDICT.—Where the circumstances of the case and the proofs are such that the jury could readily infer therefrom that the power of attorney was false and forged, and that the defendant uttered the same with fraudulent intent and guilty knowledge, the verdict of guilty or forgery will not be disturbed.

ID.—EVIDENCE—CONVERSATION OF DEFENDANT—IMPEACHMENT—REBUTTAL.—Where the defendant on cross-examination denied ever having had a conversation with witnesses named or with any person to the effect that he and Geddes were going on a bank deal, and that if it went through they would have money to burn, the witnesses named may be allowed in rebuttal to testify to such conversation for the purpose of impeachment.

ID.—INSTRUCTION—HYPOTHESIS OF GUILT AND OF INNOCENCE—CIRCUMSTANTIAL EVIDENCE—CRITICISM—ERROR CORRECTED.—Where the jury were properly instructed that "every fact essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved," such instruction corrects any error or vice in the remainder of the instruction copied from the opinion in *People v. Cronin*, 34 Cal. 202, relative to a case of circumstantial evidence, since criticised as "inexact and illogical."

ID.—MISCONDUCT OF DISTRICT ATTORNEY AND JUDGE—CONFLICTING AFFIDAVITS—PROVINCE OF JUDGE—DISCRETION—APPEAL—Where there were conflicting affidavits as to alleged misconduct of the district attorney and of the judge, the duty of ascertaining the truth therefrom was peculiarly the province of the judge who tried the case, and his decision thereupon will not be interfered with upon appeal, unless it clearly appears that his discretion was abused.

ID.—NEWLY DISCOVERED EVIDENCE — DISCRETION — PRESUMPTION.—A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the court, and the presumption is that the discretion was properly exercised in denying the motion, when the affidavits were conflicting, and a strong case was not made by the moving party, both in respect of diligence and as to the truth and materiality of the newly discovered evidence.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. E. W. Risley, Judge.

The facts are stated in the opinion.

Frank H. Short, and W. D. Crichton, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

COOPER, C.—The defendant was charged in the information with the crime of forgery in having, on the thirty-first day of January, 1899, willfully and knowingly uttered and passed as true and genuine a certain false, forged, and counterfeit power of attorney, with intent to cheat and defraud one Levy. He was convicted and judgment entered accordingly. This appeal is from the judgment and from an order denying defendant's motion for a new trial.

1. The main point urged upon this appeal is that there is not sufficient evidence to sustain the verdict. It is the settled rule that if the verdict of the jury is based upon substantial evidence it will not be disturbed, although it may not be supported by a preponderance of the testimony. All questions of conflict of testimony and of credibility of witnesses are wisely left to the judgment of the jury, they being the exclusive judges of all questions of fact.

In this case, after a careful consideration of the evidence, we think it supports the verdict. It appears that some time prior to the date of the alleged offense one Edwin Geddes had an account amounting to several hundred dollars with the Fresno Loan and Savings Bank, which afterward suspended business and went into liquidation. The account of said Edwin Geddes was evidenced by a bank-book, and the account and book contained the name "E. Geddes." This book and account were, after the suspension of the said bank, assigned by said Edwin Geddes to the First National Bank of Fresno city for collection. The defendant procured a power of attorney from one Elmer Geddes, signed and acknowledged under the name of "E. Geddes." Under this power of attorney the defendant sold the account to one Levy for sixty-five cents on the dollar and received a check from Levy for the amount of eleven hundred and three dollars and seventy cents. The check was drawn payable to the order of E. Geddes. The defendant took the check to the bank, indorsed it "E. Geddes, by his attorney in fact, W. E. Rushing," and the check was paid to defendant. That the money was procured under an assignment made by defendant as attorney in fact of Elmer Geddes, who had no account at the bank, is not disputed. That the power of attorney was signed "E. Geddes," and the assignment to Levy made in the name "E. Geddes" is conceded. Defendant received the money from Levy upon the representation that he was selling the account of "Edwin Geddes" and that he had the genuine power of attorney of said Edwin Geddes. There is no question but that defendant was guilty if he knew that Elmer Geddes, whose power of attorney he held, was not the owner of the account at the bank. The question as to his guilty intent was for the jury, and, if the evidence was such that it could reasonably draw therefrom the inference of guilt, its verdict will not be disturbed. (*People v. Swalm*, 80 Cal. 49.¹)

The defendant uttered a forged instrument and thereby defrauded Levy. This being an unlawful act it is presumed that it was intended. The defendant took the false Geddes twice to a notary public to get his acknowledgment to the power of attorney. He sold the account and book for much

¹ 13 Am. St. Rep. 96.

less than its value. After the power of attorney was drawn defendant asked one Hockenberry to say nothing about the transaction until he got the money. He made contradictory statements as to the whereabouts and identity of Geddes to the witness Bernhard. He made inquiries as to the whereabouts of Edwin Geddes prior to the time he procured the power of attorney from Elmer Geddes. He asked the witness Irwin about Edwin Geddes and as to what kind of a man he was. He said in the presence of the same witness and one Angell, while with Elmer Geddes: "Geddes and I are going to Merced to-night. We are working on a little bank deal here, that if it goes through we will have plenty of money, or money to burn." Defendant testified that he paid the money he received less his commission to one Shanklin, a brother in law of Elmer Geddes. That he paid half his commission to one Shattuck, a real estate dealer, who assisted to find a purchaser for the account. Neither Shanklin, Shattuck, nor Elmer Geddes were called as witnesses. There are other circumstances which strongly point to defendant's guilty knowledge, but the above are sufficient.

2. It is contended that, conceding that defendant had guilty knowledge of the falsity of the transaction, that he was guilty of false personation, and not of forgery. That the signing of his own name by Elmer Geddes to the power of attorney would not constitute forgery, although the signature was intended by Elmer Geddes and defendant to be used as the signature of Edwin Geddes with a fraudulent purpose. We do not so understand the law. Every person who, with intent to defraud another, falsely makes, utters or publishes a power of attorney, knowing the same to be false or forged, is guilty of forgery. (Pen. Code, sec. 470.)

A man may be guilty of forgery by making a false deed or instrument in his own name, if the name was placed upon the instrument with the fraudulent intent of throwing the *onus* of the obligation upon another, and of making the writing purport to be the writing of another. A man who forges another's name cannot excuse himself upon the ground that the name happened to be identical with his own. (2 Bishop's New Criminal Law, sec. 587; 2 Russell on Crimes, 9th ed., 718 et seq.; *People v. Peacock*, 6 Cow.

72; *Barfield v. State*, 29 Ga. 127.²) Because the initial of Elmer Geddes' name is "E," he will not be allowed to forge the name of every other Geddes in the state whose initial might be "E," and in defense claim that he was only signing his own name. If the power of attorney was made and signed by Elmer Geddes for the fraudulent purpose of getting the money of Edwin Geddes, which was on deposit in the bank, and if defendant knew all these facts and uttered the power of attorney for the purpose of making the sale to Levy, knowing that Levy believed it to be the power of attorney of Edwin Geddes, he committed the crime of forgery.

3. There was no error that would justify a reversal in the admission of the testimony of the witnesses Irwin and Angell in rebuttal. Counsel concede the rule correctly when they say: "Ordinarily, the order of proof is in the discretion of the trial court, and when there is not an abuse of discretion a case will not be reversed solely because the order of proof is varied somewhat from its customary or even from its proper channels." The court did not abuse its discretion in the admission of this testimony. The evidence was also for the purposes of impeachment. In the cross-examination of the defendant he was asked relative to his inquiries as to the whereabouts of Edwin Geddes, and also as to whether or not the conversation occurred in which he said he was going to Merced on a bank deal. He said: "I did not have a conversation with Con Angell and Jack Irwin or anyone else being present in which I stated in substance and effect that I and Geddes were going to Merced that night on a bank deal, and if it went through we would have money to burn; no such conversation took place anywhere at any time."

The testimony objected to as rebuttal was to the effect that defendant did have such conversation, and was admissible for the purpose of impeachment.

4. It is claimed that the court erred in giving the following instruction: "You are further instructed that while every fact essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved, still where the evidence is entirely circumstantial, yet it is not

only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eyewitnesses would have been."

The instruction is copied from the opinion of Judge Sanderson in *People v. Cronin*, 34 Cal. 202, and while criticised was held not to be error in *People v. Dole*, 122 Cal. 495.³ In the latter case, in an opinion written by the chief justice, the instruction is criticised as being "inexact and illogical," but it was held that the vice was corrected by the special instruction (as in this case) "that every fact essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved."

5. It is claimed that the district attorney was guilty of improper conduct, in his address to the jury, in commenting upon the defendant's evidence and his occupation, and that the judge was guilty of improper conduct in keeping the jury out too long, and in a remark made to defendant's attorneys when interrupted while reading instructions to the jury. In support of the claim the defendant's attorneys read their own affidavit in which they set forth what they claim to be the facts. The prosecution read in reply the affidavits of the district attorney, his deputy, and the judge. It is sufficient to say that these affidavits on behalf of the prosecution were squarely contradictory of the affidavits of defendant as to all material matters tending to show misconduct either of the district attorney or the judge. The duty of ascertaining the truth from the affidavits was peculiarly the province of the judge who tried the case, and we would not interfere unless it clearly appears that such discretion was abused. In this case we do not feel justified in interfering with the conclusion reached by the judge who heard the evidence, and who personally knew of all the proceedings as they occurred in the courtroom.

6. The court did not err in denying the motion for a new trial on the ground of newly discovered evidence.

"A motion for a new trial upon the ground of newly discovered evidence is looked upon with suspicion and disfavor,

³ 68 Am. St. Rep. 50.

and a party who relies upon that ground must make a strong case, both in respect to diligence on his part in preparing for the new trial and as to the truth and materiality of the newly discovered evidence, and that, too, by the best evidence obtainable; and if he fails in either respect, his motion must be denied." (*People v. Freeman*, 92 Cal. 359.)

Applications of this kind are addressed to the discretion of the court below, and the presumption is that the discretion was properly exercised. There are many affidavits in the record, some in direct conflict with others. The trial court was in a far better position than this court to pass upon the truth of the matters contained therein.

We have examined the other alleged errors, and find nothing that would justify a reversal of the case.

We advise that the judgment and order be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J.,	Van Dyke, J.,
Garoutte, J.,	Temple, J.,
Harrison, J.,	Henshaw, J.

[L. A. No. 717. Department One.—November 9, 1900.]

FARMERS' EXCHANGE BANK OF SAN BERNARDINO, Respondent, v. J. S. PURDY et al., Defendants.
W. C. MAIR, Assignee of Estate of J. S. Purdy in Insolvency, Appellant.

MORTGAGE TO CORPORATION—ACKNOWLEDGMENT BEFORE INTERESTED OFFICER—OBJECTION BY ASSIGNEE OF INSOLVENT MORTGAGOR.—The assignee in insolvency of the estate of an insolvent mortgagor merely represents his creditors, and is not a subsequent purchaser for value and in good faith, and cannot contest the validity of a prior mortgage of the insolvent to a corporation on the ground that the acknowledgment was void because taken before a notary public, who was an officer of the corporation, holding stock therein.

ID.—OBJECT OF ACKNOWLEDGMENT—RECORD.—The only object of an acknowledgment is that the instrument may be recorded, unless the statute makes it essential to the validity of the instrument.

ID.—VALIDITY OF UNACKNOWLEDGED MORTGAGE—INSOLVENCY OF MORTGAGOR.—An unacknowledged and unrecorded mortgage is valid between the parties, and it is equally valid as against the subsequent assignee in insolvency of the mortgagor if it was not executed in violation of the provisions of the Insolvent Act.

APPEAL from a judgment of the Superior Court of San Bernardino County. Frank F. Oster, Judge.

The facts are stated in the opinion.

L. M. Sprecher, and George B. Cole, for Appellant.

Under section 59 of the Insolvent Act of 1895 an acknowledgment of the mortgage was necessary to give it validity as against the assignee in insolvency. A notary beneficially interested is disqualified from taking an acknowledgment. (Proffatt on Notaries, sec. 35; *Merced Bank v. Rosenthal*, 99 Cal. 39; *Lee v. Murphy*, 119 Cal. 364; *Jones v. Porter*, 59 Miss. 628; *Wilson v. Traer*, 20 Iowa, 231.)

Otis & Gregg, for Respondent.

The acknowledgment of the mortgage was not void, no disqualification of the notary appearing upon the face of the instrument. (*Merced Bank v. Rosenthal*, 99 Cal. 39; *Lee v. Murphy*, 119 Cal. 364; *Stevens v. Hampton*, 46 Mo. 404; *Benson Bank v. Hove*, 45 Minn. 40.) There is no proof of bad faith in the case. (*Cooper v. Hamilton etc. Bldg. etc. Assn.*, 97 Tenn. 285.¹) The mortgage, if not properly acknowledged or recorded, is valid between the parties (*Landers v. Bolton*, 26 Cal. 393; *Hastings v. Vaughn*, 5 Cal. 315), and as against the assignee in insolvency of the mortgagor, there being no violation of the Insolvent Act. (*Francisco v. Aguirre*, 94 Cal. 183, 184.)

COOPER, C.—This action was brought to foreclose a mortgage made by defendant Purdy to plaintiff. Findings were filed, upon which judgment was entered for plaintiff. This appeal is from the judgment.

¹ 56 Am. St. Rep. 795.

The findings are unchallenged, and show that on January 26, 1898, the defendant Purdy executed his promissory note to plaintiff for three thousand dollars with interest, and at the same time executed and delivered the mortgage set forth in the complaint as security for the payment thereof; that the said note is overdue and unpaid. After the execution of the note and mortgage, and on February 26, 1898, defendant Purdy was adjudged insolvent, and appellant Mair appointed assignee in the insolvency proceedings. As such assignee he filed an answer and contested, and now contests, the validity of the mortgage upon the ground that it was acknowledged before a notary public who was at the time a stockholder and the cashier of plaintiff. This is the sole question in the case. The court found: "That on the twenty-sixth day of January, 1898, the said defendant, J. S. Purdy, executed and delivered unto the plaintiff herein the promissory note and mortgage set forth in the complaint herein, as one and the same transaction. That said mortgage was acknowledged by said J. S. Purdy before one S. F. Zombro, a notary public in and for said county of San Bernardino, duly qualified, commissioned and sworn as such notary public; the said Zombro being, at the time of the taking of said acknowledgment, the cashier of the plaintiff corporation and a director thereof, and interested as a stockholder in said plaintiff corporation to the extent of holding thirty shares of the capital stock of said corporation out of a total issue of one thousand shares of the capital stock thereof."

It is argued that the acknowledgment is void and that the mortgage was not entitled to be recorded, and is therefore void as to appellant. We do not think it necessary to discuss the validity of the acknowledgment, nor the effect of recording the mortgage as notice. The mortgage was valid as between the parties without being acknowledged. (Civ. Code, sec. 1217; *Landers v. Bolton*, 26 Cal. 405; *Grant v. Oliver*, 91 Cal. 163.)

The only object of an acknowledgment is that the instrument may be recorded, unless the acknowledgment is by statute made essential to the validity of the instrument. (Civ. Code, secs. 1091, 1217.)

A mortgage, though not recorded, is valid as to all persons, except subsequent purchasers or mortgagees for value and in

good faith whose conveyance is first duly recorded. (Civ. Code, sec. 1214; *Warnock v. Harlow*, 96 Cal. 306²; *Bank of Ukiah v. Petaluma Sav. Bank*, 100 Cal. 591.)

The appellant only represents the creditors of the insolvent Purdy. He is not a subsequent purchaser or mortgagee for value or in good faith or otherwise. It follows that he is in no position to question the validity of the mortgage upon the ground that it was not properly acknowledged. It is claimed that under section 59 of the Insolvent Act of 1895 the mortgage was not in fact made until recorded, and that it was never in fact recorded because not entitled to be recorded. The clause of the section relied upon is as follows: "All assignments, transfers, conveyances, mortgages, or encumbrances of real estate shall be deemed, under this section, to have been made at the time the instrument conveying or affecting such realty was filed for record in the county recorder's office of the county or city and county where the same is situated." As applied to this case, the clause refers to the antecedent provisions of the section to the effect that a debtor who being insolvent or in contemplation of insolvency, within one month prior to the filing of a petition, by or against him, with a view to give a preference to any creditor, makes a mortgage to one who has reasonable cause to believe such debtor insolvent, and that such mortgage is made with a view to prevent his property from coming to his assignee in insolvency or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or hinder or impede the operation of, any of the provisions of the act, such mortgage shall be void. The contention is fully answered by the fifth finding of the court, in which it is found that the mortgage was not made in contemplation of insolvency, or with a view to give any preference to plaintiff, and that plaintiff did not have any reasonable cause to believe that Purdy was insolvent at the time said mortgage was made. This finding is in no way challenged, and hence, as the mortgage was not one mentioned in section 59, the clause of the section quoted has no application. The mortgage, when offered in evidence, was objected to upon various grounds, which, taken together, went to the question of the alleged de-

fective acknowledgment. The objections were properly overruled. Counsel for appellant says in his opening brief: "The object of an acknowledgment is twofold—to entitle the instrument to be used as evidence without further proof, and to enable it to be recorded." The objections, as before stated, went to the acknowledgment. There is no objection that the mortgage was not in fact made as alleged.

We advise that the judgment be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Harrison, J., Van Dyke, J., Garoutte, J.

[Sac. No. 686. Department Two.—November 9, 1900.]

AMERICAN TYPE FOUNDERS' COMPANY, Respondent, v. GEORGE F. PACKER, Appellant.

NEW TRIAL—SPECIFICATIONS IN STATEMENT—INSUFFICIENCY OF EVIDENCE—OBJECT OF STATUTE.—The object of the statute relating to specifications of the insufficiency of the evidence in a statement on motion for a new trial is for the benefit of the opposing party and to abbreviate the statement. The specifications are sufficient if they enable opposing counsel to determine what evidence should be put in the statement, and enable the judge to strike out redundant and useless matter. The statute is primarily for the trial court, which is better able than the appellate court to determine whether the specifications are sufficient.

ID.—CONSTRUCTION OF SPECIFICATIONS—PLEADING—NOTICE.—The specifications are not to be deemed in the nature of a pleading, which is to be construed most strictly against the pleader, but in the nature of a notice which is to be regarded with liberality, and the sufficiency of which is to be tested by inquiring whether the other party is injured by defects.

ID.—SPECIFICATION OF PARTICULARS—ACTION OF TRIAL COURT—REVIEW UPON APPEAL.—Where there is a reasonably successful effort to state the particulars of the insufficiency of the evidence, and the specifications are such as may have been sufficient to notify counsel and the court of the grounds relied upon, and the trial court has entertained and passed upon the motion, the appellate court ought

not to refuse to consider the case on appeal, especially if the transcript shows that all the evidence has been brought up.

CONTRACT—PERFORMANCE—LIMITATION OF TIME—DAMAGES.—A contracting party is not excused, either at law or in equity, from performing his contract within the time agreed upon. The other party may always recover any damages suffered in consequence of the failure to perform the contract within the time limited.

ID.—CONTRACT TO BUILD PUMPING PLANT—ACTION AT LAW—ERRONEOUS FINDING.—In an action at law to recover the price stipulated in a contract to build a pumping plant alleged to have been fully performed by the contractor, a finding that the time fixed in the contract for its completion was not of the essence of the contract is erroneous and has no force.

ID.—FAILURE TO COMPLETE CONTRACT AS AGREED—RIGHT OF RESCISSION DEPENDENT UPON CIRCUMSTANCES.—In certain contracts a failure to perform strictly according to contract, as to time, does not authorize the other party to rescind; but time is of importance, as a general rule, in an agreement to construct machinery or to render services. Whether the defendant has the right to rescind the contract depends upon whether the circumstances show a slight omission or imperfection, not of the substance of the contract, which might be recouped in damages, or whether there was such a material failure to complete the contract as, under the circumstances, would justify a rescission.

ID.—SUBSTANTIAL FAILURE TO PERFORM—RIGHT OF TEST AND REJECTION—RESCISSION EFFECTED.—Where it appears that there was a substantial and palpable failure to complete the contract sued upon, and to turn over to the defendant the pumping plant in a condition to be tested for thirty days, with a right of rejection thereof by the defendant, under the terms of the contract, if it was found not fulfilled (in which case the contractor was to remove it at his own expense), the service of a notice of rescission of the contract by the defendant, after the failure to perform was complete, effected a rescission, which precludes a recovery of the contract price.

ID.—FINDINGS AGAINST EVIDENCE—RESCISSION SHOWN.—The evidence reviewed, and findings that the contract was completed and that the pumping plant was turned over to the defendant to be tested under the terms of the contract, and that he failed to test it, held against the evidence; and further held that the court ought to have found from the evidence that the rescission of the contract was full and complete.

APPEAL from a judgment of the Superior Court of Colusa County and from an order denying a new trial. H. M. Albery, Judge.

The facts are stated in the opinion of the court.

U. W. Brown, John T. Harrington, Peter J. Shields, and Hiram W. Johnson, for Appellant.

Gordon & Young, and Edwin Swinford, for Respondent.

TEMPLE, J.—This action is upon a building contract entered into between plaintiff's assignor, J. Grover, and defendant, whereby Grover contracted to build for defendant a pumping plant for a stipulated price. Plaintiff avers that the contract was fully performed by Grover. Defendant denies that the plant was constructed according to the contract, or at all. Judgment was rendered for plaintiff, and defendant appeals from the judgment and from an order refusing a new trial.

Objection is made to the specifications in regard to the alleged insufficiency of the evidence to support the findings. The requirement of the statute is for the benefit of the opposing party and to abbreviate the statement. If the specification is sufficient to enable the opposing counsel to determine what evidence should be put in the statement, and the judge to strike out redundant and useless matter, it is enough. The statute in this matter is not primarily for this court, but for the trial court. That court should not hear the motion unless the statement contains such specifications. Upon that subject the trial judge, who tried the case, has a decided advantage over this court in determining whether the specifications are sufficient.

In many of the cases the specification seems to have been regarded as a pleading—as a sort of complaint in error, where all the intendments are against the pleader, and the moving party is not even allowed the benefit of the rule that errors shall be disregarded, if we can see that injury has not been done. Plainly, this is not correct. It is in the nature of a notice, the sufficiency of which should be tested by inquiring whether the opposite party is injured by defects. It is not even to be regarded with the strictness with which an error of the court must be. If error at all, it is committed by a party and in a matter in which great liberality should be exercised by courts. Whenever there is a reasonably successful effort to state "the particulars," and they are such as may

have been sufficient to inform the opposing counsel and the court of the grounds, and the trial court has entertained and passed upon the motion, in my opinion this court ought not to refuse to consider the case on appeal, and especially where, as in this case, the transcript shows that all the evidence has been brought up.

The defense attempted is that the contract was not performed by plaintiff's assignor: 1. That the plant was not completed within the time agreed upon; and 2. That in many important and material respects it has never been completed.

Defendant also pleads a rescission, because of the failure of plaintiff's assignor to perform his contract.

As to the first point, the court finds that the defendant, by his acts and conduct, waived the performance within the agreed period of ninety days, and there is some evidence to sustain the finding. The evidence, however, upon this point is very close, and the court may have been influenced by its views as expressed in a further finding, that the plant was designed to pump water for irrigation, and it was agreed that it should be completed and in running order in not to exceed ninety days from the date of the contract, April 1, 1897, but the time "was not fixed and agreed upon between said parties and inserted in said contract for the express purpose of having said plant in position and completed so as to pump water and furnish water for the purpose of irrigation during the summer and irrigation season of 1897, and in that regard time was not of the essence of the contract."

A new trial is necessary on other grounds, and, therefore, it is proper to say that this finding is plainly erroneous as matter of law. Neither at law nor in equity is a contracting party excused from performing his contract within the time agreed upon, further than that in certain contracts failure to perform strictly according to contract, as to time, does not authorize the other party to rescind. He may always, however, recover any damage he has suffered in consequence of such failure. In equity, in actions for specific performance, the court may in its decree provide such compensation. The statement that time is not of the essence of the contract is misleading in any case, and has no force whatever in an action at law. In such cases, to enable one to rescind for a breach on the part of the other party, the failure must be as to a material matter. "If the omission or imperfection is so slight

that it cannot be regarded as an integral or substantial part of the original contract, and the other party can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action (*Harlan v. Stufflebeem*, 87 Cal. 508.) Whether the failure to complete the plant in time was sufficiently material to justify a rescission depended upon the circumstances of the case. Cases in equity in which this rule is applied are usually for the specific performance of contracts for the purchase of land. Often the failure is merely to pay at a specified date. A slight delay in such a case is usually of no great importance, and the detriment is easily compensated by interest. An agreement to construct machinery or to render services is quite different. There, as a general rule, time is of importance.

I think it quite clear that the finding to the effect that plaintiff's assignor furnished and installed the pumping plant according to his contract, disregarding the question of time, is wholly unsupported by the evidence.

The important portions of the contract are, in substance, as follows: Grover agreed to furnish a pumping plant, installed on the property of defendant, "guaranteed to perform the following service and to consist of the following parts: The plant shall consist of one Hercules gasoline and distillate engine of eighty horse-power, set in position and connected by means of belting to one twelve-inch San Francisco Tool Company's centrifugal pump, with all necessary pipe for suction and discharge, and such minor details as will be necessary to complete the plant; the same to have a guaranteed capacity of six thousand (6,000) gallons per minute, under a service of twenty-seven (27) feet," etc.

This was the main pump for irrigation, and, in addition, there was to be a pump with a capacity of from three hundred to four hundred gallons per minute connected with the same engine. Then follows an enumeration of the fittings. Grover was to pay all steamer freight and to furnish cement. Packer was to do all necessary hauling, furnish gravel for cement, and make excavations.

It was further agreed that after the plant was completed and turned over to Packer he should have thirty days to

operate and test said plant, "and thereby ascertain whether or not the contract has been filled, as above specified." If the test proved that the contract had been fulfilled, Packer must pay the contract price. "If, however, at the expiration of thirty days, it is found that the contract has not been fulfilled, then at the option of said George F. Packer the plant can be ordered removed from his property, and said removal made at the expense of said J. Grover." Grover also warranted the engine for one year against breakage caused by flaws in material or faulty construction.

The court found that the pumping plant was completed on July 14th, and was turned over to the defendant July 17th, in order that defendant could operate and test the plant under the terms of the contract, but defendant failed so to do.

As I read the statement there was no evidence whatever tending in the slightest degree to support this conclusion, except some opinions of the employees who constructed the plant, as to its completion according to specifications, but the uncontradicted evidence shows, in the clearest possible way, that the plant was not completed on the 17th of July, and was not then, and has never been, turned over to Packer to enable him to make the test, and if it had been so turned over the evidence of plaintiff's witnesses without conflict demonstrated that the test could not have been made.

The finding, of course, means that the plant was finished so that Packer could subject it to the thirty-day test provided for in the contract. There is no finding to the effect that the plant was found sufficient upon the test agreed upon, but, in lieu of such finding, the court concluded that defendant, without justification, refused to make the test.

The contract specifies certain parts of the plant to be supplied, but not necessarily all. Grover was to install a pumping plant guaranteed to have a certain efficiency, and agreed besides the enumeration to furnish "all necessary pipe for suction and discharge, and such minor details as will be necessary to complete the plant; the same to have a guaranteed capacity," etc. All that Packer was to do in the constructing of the plant is also specified.

Mr. Doak superintended the construction of the plant, and was the chief witness for plaintiff. He testified that the

plant was completed on the 14th of July and tested on the 17th of the same month, and "with the exception of the little circulating pump and the clutch-pulley, it was one of the nicest working plants I ever saw." These exceptions happened to be very important. After a few starts it developed that the clutch-pulley failed to be serviceable, and it was taken off by Mr. Doak, and by his direction was sent off for repairs. Of course the plant was not in a condition for the thirty-day test at that time, and whatever Mr. Doak may have said to Mr. Packer about such a test his own testimony shows that it was simply impossible. Mr. Doak returned in August and replaced the parts of the machinery he had taken away with him and ran water through the pump eight or ten times. He says they took water for the circulating pump from a large tank belonging to Mr. Packer, and this water was full of manure and straw and clogged the engine and prevented continuous working, and they were forced to stop every three or four minutes. Of course he had no right to take water from that source if it was unfit, but should have constructed a tank, if one was necessary. Mr. Grover was to construct a pumping plant with a guaranteed capacity, and to furnish necessary appliances to complete the plant, and Mr. Packer had the privilege of thirty days' test, at the expiration of which time Packer was authorized to require it to be removed at the expense of Grover if it was "found that the contract has not been fulfilled." Such a plant he, Grover, was to turn over to Mr. Packer for trial. Of course, when turned over for this trial, it was necessary that it should be in fit condition to be tried. The part to be contributed by Mr. Packer is explicitly stated in the contract, and he was not required to build any tanks or a house over the pumping plant.

Another attempt to run the machine was made in September, the clutch-pulley having been in the meantime restored. Confessedly the clutch-pulley would not work well, and it was necessary to stop the engine every few minutes to remove straw and manure from the engine.

At that time some of plaintiff's employees insisted to Mr. Packer that the plant was complete, and he said that he would give it a good trial, but before they left the employees of plaintiff removed the clutch-pulley and took it to the city for repairs, and have never replaced it or attempted to do so.

Two excuses for this palpable failure to perform his contract on the part of Mr. Grover are attempted: First, it is said the machine could have been worked without a clutch-pulley. This is undoubtedly true. The first plan for this plant was to use a belt-tightener instead, and quite probably the great mistake made by Mr. Grover was in changing that plan. The function of the clutch-pulley was to enable the gearing which moved the large pump to be thrown in and out of gear. Other contrivances are mentioned by means of which this same thing could be done, but none of them were made parts of this plant. The means provided here was the clutch-pulley, and, confessedly, it would not work, and Mr. Packer was never afforded an opportunity to make the stipulated trial of the plant; and there is no evidence whatever tending to show that he was afforded such opportunity. The second excuse is that the clutch-pulley was injured by sand and grit and should have been protected by a house built over it. Mr. Packer has never contended that Mr. Grover should have built such a house, but if it was so essential to the working of the plant, his contract bound him to build it. Mr. Packer was asked to build it, and replied that he did not wish to incur that expense until he knew that the plant would work. This certainly was his privilege under the contract. I repeat, the mistake probably was in employing a clutch-pulley at all, but Mr. Packer is not responsible for this change. It was not made at his request nor with his concurrence.

On the 27th of August, 1897, Mr. Packer notified Mr. Grover that the plant had not been completed at the time agreed upon, and he therefore rescinded the contract. Possibly, in view of the finding that defendant had by his acts waived performance within the stipulated period, this notice was premature.

On the 9th of September, which was after the plaintiff's employees had again attempted to run the plant and again had removed an essential part of the machinery, Packer again notified Mr. Grover that the plant had not been finished and put in running order, and that he rescinded the contract and requested the removal of the plant from his premises. And again, on the eleventh day of October, 1897, having been notified of the assignment by Grover of his claim to plaintiff, Mr. Packer served a similar notice both upon Mr. Grover and upon plaintiff.

Surely at the time the last notice was served the failure on the part of Mr. Grover was complete. He had not constructed a serviceable pumping plant and had then shown by his conduct that he did not intend to make any further effort in that direction. From the evidence the rescission was complete and perfect, and the court should have so found.

The judgment is reversed and the cause remanded for a new trial.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 1711. Department Two.—November 9, 1900.]

MONROE GREENWOOD et al., Respondents, v. MINNIE
S. CHANDON et al., Appellants.

STREET ASSESSMENT—AUTHENTICATION OF RECORD—ENGINEER'S CERTIFICATE.—In an action to foreclose a street assessment, where the certificate of the engineer appears to have been recorded in its proper place, together with the original assessment, warrant, and diagram, and the certificate of record appended thereto by the superintendent of streets shows by reference to the page of the record that all of the documents, including the engineer's certificate, have been recorded, the fact that in assuming to re-enumerate in his certificate the documents recorded he omits the engineer's certificate does not invalidate the authentication of the record or impair the lien of the assessment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion.

J. P. Langhorne, and J. N. Turner, for Appellants.

D. H. Whittemore, for Respondents.

CHIPMAN C.—Action to foreclose a street assessment lien upon defendants' land in San Francisco, for the work of grading the center roadway of Army street, from Penn-

sylvania avenue to Kentucky street, to a width of twenty-three feet. Judgment was entered for plaintiff, motion for new trial denied, and this appeal is from the judgment and order. An order was made by the trial judge substituting the executors of plaintiff in his stead, but the original title of the cause is retained. It is stipulated that like appeals in two other cases—S. F. No. 1712 and S. F. No. 1713—between the same parties as to the same work, may be heard on this transcript and may follow the result in this appeal.

The court found as follows: "Said warrant, assessment, diagram, and surveyor's certificate were duly recorded by said superintendent, in the office of said superintendent, on the date last aforesaid, in volume 97, page 50, of the assessment records, and the record thereof was duly signed by said superintendent. That the certificate of the said city and county surveyor relating to said work was also duly recorded by said superintendent in his office at the time of issuing said assessment." The appeal rests upon the claim that the evidence is insufficient to justify the above findings, and the point urged is that the engineer's certificate was not recorded with the assessment, warrant, and diagram so as to make the assessment a lien as required by section 9 of the general street law. (Stats. 1889, p. 167.)

The transcript shows as follows: "Plaintiff introduced in evidence the original assessment, warrant, diagram, and engineer's certificate, and affidavit of demand and nonpayment, all in due form." With this, and evidence of the assignment of the contract to plaintiffs, they rested. Upon the point in question the record made by defendants shows as follows: "Defendants also caused to be produced from the office of the superintendent of streets, and introduced in evidence, the only alleged record in said office of the said assessment, engineer's certificate, diagram, and warrant, all of which appeared to have been written, in the order above mentioned, in a book kept in said office. At the end of the foregoing alleged record was written a certificate by the street superintendent as follows: "The foregoing, on page No. 50. is a true and correct record of assessment, diagram, and warrant, recorded and issued this second day of July, A. D. 1895. Thomas Ashworth, superintendent of public streets highways, and squares.' The foregoing was the only alleged

certificate by said officer to the only alleged record of the said documents in his said office. The foregoing are all the testimony and proofs in the case."

It thus appears that the original assessment, warrant, diagram, and engineer's certificate, all in due form, were introduced, and that the record of the superintendent's office showed therein recorded all these documents in the order mentioned in the transcript; and it also appears in the certificate of the superintendent appended to the foregoing, and forming part of the record, that these documents referred to "on page 50 is a true and correct record," but in recapitulating what the documents are he omitted to include the engineer's certificate. Appellants' contention is that the certificate is by its terms limited to the documents specifically therein named, and therefore the certificate fails to comply with the law in an essential and indispensable particular because it fails to specify the engineer's certificate. We think this is too narrow a construction to be put upon the certificate. When the superintendent said "the foregoing on page 50 is a true and correct record," he said all that was necessary to a good certificate, and he spoke the truth, for the evidence showed that the engineer's certificate was in fact in the record just preceding the diagram. We do not think his subsequent enumeration in the certificate of what the record contained, in which he omitted to include the engineer's certificate, invalidated the assessment, or that it can for that reason be said not to authenticate the record. That the record of the documents required to impose a street assessment lien must be authenticated by a certificate of the street superintendent is well settled. (*Himmelman v. Danos*, 35 Cal. 441; *Witter v. Bachman*, 117 Cal. 318, cited by appellant.) In the *Himmelman* case the record was complete as required by the statute, and under the copy recorded in the book kept for the purpose were written the following words: "Recorded this ninth day of October, A. D. 1866." This certificate was sufficient in form, but it was not signed, and therefore did not constitute an authentication, and that was the trouble in the *Witter* case.

Section 9 of the act of 1889 provides as follows: "Said warrant, assessment, and diagram, together with the certificate of the city engineer, shall be recorded in the office of

superintendent of streets," but says nothing about the duty of the superintendent to sign or authenticate the record. Section 10 of the act of 1885 (Stats. 1885, p. 147), however, provides that the superintendent "shall sign the record," but no form of authentication is prescribed. This section seems not to have been amended by the amendatory act of 1889. Much the same question arose in *Perine v. Lewis*, 128 Cal. 236. The court said: "Whether the documents copied into the record book are such as are required to be recorded is to be determined by an inspection of the documents themselves, and not by what the recording officer may have designated them, or by the fact that he has omitted to give them any designation. If the superintendent had certified, 'The foregoing on pages 79, 80, and 81 has been correctly recorded this third day of October, 1895,' and had authenticated the same by his signature, it could not be contended that the documents found on those pages were not recorded by him, even though he had not designated their character. The same result must follow when he has failed to designate one of the documents so recorded." In that case, as in this, the certificate failed to designate the engineer's certificate.

We advise that the judgment and order be affirmed.

Haynes, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Harrison, J.

[S. F. No. 1731. Department One.—November 10, 1900.]

EMMA S. STOUT, Respondent, v. PACIFIC MUTUAL
LIFE INSURANCE COMPANY OF CALIFORNIA,
Appellant.

ACCIDENT INSURANCE—DEATH THROUGH EXTERNAL AGENCY—EVIDENCE.

In an action upon a policy of accident insurance, conditioned upon the death of the insured happening from "bodily injuries sustained through external violent, and accidental means," a verdict in favor of the plaintiff will not be disturbed on appeal on the ground that it is not supported by the evidence, if the evidence is conflicting as to whether the death resulted from a disease of the heart, or as the result of a blow on the head of the insured, occasioned by the capsizing of a rowboat in which he was riding within an hour of his death.

ID.—WEIGHT OF EVIDENCE.—The conflicting testimony as to the immediate cause of the death, including the inherent improbability of the truth of a witness who testified to the reception of the blow, is a matter for the jury to weigh and determine.

ID.—CHARACTERISTICS OF BLOW CAUSING DEATH.—A witness present at the time of the infliction of the blow on the insured may be asked to describe its apparent characteristics and as to whether it was a light or a heavy blow.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

M. B. Kellogg, for Appellant.

Van Ness & Redman, for Respondent.

GAROUTTE, J.—This is an action upon a policy of accident insurance. By said policy the defendant promised that it would pay the plaintiff the sum of two thousand dollars in the event of the death of her husband resulting from "bodily injuries sustained through external, violent, and accidental means." The husband died and the question upon this appeal is, Did he die from "bodily injuries sustained through external, violent, and accidental means"? The verdict of the jury declares that he died through such means, and the insurance company insists that the evidence is not sufficient to support the verdict.

The substantially conceded facts are these: "The deceased and his son, a boy of seventeen years of age, were in a small boat upon the bay of San Francisco. Owing to adverse winds and tides they were unable to make land and hailed a passing launch, which gave them assistance by undertaking to tow them to a place of safety. The tow-line was too short, and the launch, in making a turn, caused the smaller boat to capsize. At that time the boy was in the center of the boat and the deceased sitting at the stern. As the boat tipped the boy fell into the water, and the father reached to save him. Owing, possibly, to the speed of the launch, the boat turned a complete revolution, and when it came right about, the deceased was lying in the bottom unconscious. He was then placed upon the launch, taken ashore, and within an hour the doctors pronounced him dead.

The coroner's inquest resulted in a verdict of death from disease of the heart. Certain physicians and surgeons who held an autopsy testified that, in their opinion, disease of the heart was the cause of death, and they further testified that the heart was badly diseased. Other physicians and surgeons testified directly to the contrary, and to the effect that disease of the heart was not the cause of death, and that the heart was not diseased. The son testified that as the boat turned over, and as his father reached to save him, he (the father) was struck upon the head by the row-locks a medium heavy blow. In support of this testimony two abrasions of the skin upon the head were found. The evidence being squarely conflicting as to the defective or nondefective condition of the heart of deceased, this court is bound to assume that it was in a normal condition. Reduced to a minimum, we then find the evidence to be that a man in the full vigor of life is capsized from a boat, and at the same instant struck upon the head by the row-locks a medium heavy blow; in a few minutes of time thereafter he is picked up unconscious, and within an hour is dead. Upon this meager evidence we should be strongly inclined to hold that a *prima facie* case of accidental death was proven. But in addition to this, we have certain evidence of experts to the following general effect:

"Q. Assume a boat in the bay of San Francisco, with a

heavy sea, and a strong wind blowing. This rowboat is attached to a launch by a painter or rope; the boat is being drawn through the water by the launch, when it suddenly starts to turn over. The man is seated in the stern of the boat, and the boy is seated in the middle of the boat. As the boat starts to turn over, the man throws himself forward or reaches forward to stop the boy from falling out of the boat; and as he goes forward the boat goes over; and in this condition he is struck in the temple by the rowlocks of the boat; and then the boat, continuing its motion, swings completely over in the water, and comes up on the other side. Could death be caused by a blow of that character? A. I will say yes. Q. What would you say caused the death? A. It might be different things. A man receiving a blow like that might rupture the meninges of the brain, producing paralysis and unconsciousness, and perhaps die from that; or cerebral apoplexy, perhaps, from a rupture of a blood vessel, would possibly cause death. That is not unusual. Q. What would you say was the cause of death in connection with that physical happening? What occurred there that would cause death? A. I would say it was cerebral apoplexy, perhaps. Q. What would have caused cerebral apoplexy? A. The injury he received from the blow. Q. Would you say it was the blow that caused the death? A. It might have been hemorrhage or apoplexy or rupture of the blood vessels of the brain." Taking all the evidence together we are satisfied it is sufficient to support the verdict of the jury.

Defendant expressly attacks the probability of the truth of the son's evidence, wherein he testifies that his father's head was struck by the rowlocks. Counsel insists that the surrounding conditions at the moment of the overturning of the boat render the evidence of the son unworthy of belief, and absolutely indicate that no blow could have been received by deceased. We will not follow defendant's technical analysis of the various phases of the evidence, in order to disprove his contention in this respect. It is sufficient to say that we see no physical impossibility arrayed against the truth of the testimony of the boy regarding the blow. The testimony to this point was essentially a matter for the jury to weigh and analyze; and it is only in an exceptional case that this court

feels justified in finding contrary to its decision, and that is not that case.

Objection was made to the following question: "Q. Describe to the jury as to that blow, whether it was a light and easy blow, or whether it was a strong and heavy blow, or whether it was a medium heavy blow, according to your idea as you saw it." The foregoing question was clearly proper. (*Robinson v. Exempt Fire Co.*, 103 Cal. 41; *People v. Chin Hane*, 108 Cal. 602.) We find nothing in the rulings of the court upon the admission of other evidence that demands a reversal of the judgment. We likewise find the charge of the court full and fair.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

[S. F. No. 1505. Department Two.—November 10, 1900.]

GEORGE C. ALFERITZ et al., Executors, etc., Appellants,
v. JAY SCOTT, Respondent.

CHATTEL MORTGAGE OF SHEEP—RECORD WITHOUT VERIFICATION BY MORTGAGEE—ATTACHMENT—PURCHASE UNDER EXECUTION.—A chattel mortgage of sheep, recorded without any verification by the mortgagee, as required by law, is void as against an attachment of the sheep by a creditor of the mortgagor, and as against a purchaser of the sheep at a sale under execution by such attaching creditor.

ID.—VERIFICATION BY MORTGAGEE PRIOR TO ATTACHMENT—ABSENCE OF RECORD AND NOTICE.—The fact that the chattel mortgage after its record was subsequently verified by the mortgagee prior to the attachment suit, without any record of the instrument so verified, can give it no additional validity, as against the attaching creditors or the purchaser under the execution sale, neither of whom had any notice of the transaction other than that given by the record.

¹ 42 Am. St. Rep. 93.

APPEAL from a judgment of the Superior Court of Fresno County. E. W. Risley, Judge.

The facts are stated in the opinion of the court.

Raleigh E. Rhodes, and Lyman I. Mowry, for Appellants.

The affidavit of Juan Curutcharry, for and on behalf of Mariano Laurenz & Co., the mortgagors, was sufficient. (*Modesto Bank v. Owen*, 121 Cal. 223.) The mortgage was verified by the mortgagee prior to the attachment, and it then complied with the statute.

Stanton L. Carter, for Respondent.

The chattel mortgage, for want of the verification of all the parties, as required by law, when it was recorded, was void as to attaching creditors of the mortgagor, while he remained in possession. (Civ. Code, sec. 2957; Jones on Chattel Mortgages, 2d ed., 248; 3 Am. & Eng. Ency. of Law, 182; *Beamer v. Freeman*, 84 Cal. 554; *Adlard v. Rogers*, 105 Cal. 327; *Cardenas v. Miller*, 108 Cal. 250; *Butte Hardware Co. v. Sullivan*, 7 Mont. 307; *Frank v. Miner*, 50 Ill. 444.) The design of the statute is to give notice to the creditors of the mortgagor that the required acts have been actually performed. (*Griffith v. Douglass*, 73 Me. 534.) The mortgage was not properly verified by the mortgagors. Juan Curutcharry does not swear that he is of the mortgagor company, and the mere *descriptio personae*, preceding affidavit, by way of recital, does not render the affidavit sufficient. (*Butte Hardware Co. v. Sullivan*, *supra*; *Steinbach v. Leese*, 27 Cal. 298; *Baker v. York*, 65 Ark. 142; *Staples v. Fairchild*, 3 N. Y. 41; *Payne v. Young*, 8 N. Y. 158.) The affidavit is to be construed most strongly against the person in whose favor it was made. (*Nebraska M. P. Co. v. Fuehring*, 52 Neb. 541.)

THE COURT.—Action to recover the value of certain sheep alleged to have been converted by defendant. The cause was tried by the court sitting without a jury and defendant had judgment, from which plaintiffs appeal on the judgment-roll.

Plaintiffs claim under a chattel mortgage executed by Mariano Laurenz & Co., to plaintiffs' testate to secure the

payment of a certain promissory note made by the mortgagors. Defendant justifies under writ of attachment and subsequent execution sale of the sheep in question at the suit of one Emil Grunig against the said Mariano Laurenz Company.

It appears from the findings that on April 3, 1895, a chattel mortgage purporting to be between Mariano Laurenz & Co., mortgagors, and Peter Alferitz, mortgagee, was signed as follows: "Mariano Laurenz Company, Juan Curutcharry." The affidavit reads as follows: "Juan Curutcharry, of Mariano Laurenz Company, the mortgagors in the foregoing mortgage named, being duly sworn," etc., and is signed "Mariano Laurenz Company, Juan Curutcharry." The jurat is as follows: "Subscribed and sworn to this 3d day of April, 1895, at Huron, county of Fresno, before me N. L. Palmer."

No other affidavit was attached to the mortgage at that time. There was a certificate of acknowledgment reading: "Personally appeared Juan Carutchay, known to me to be the person whose name is subscribed to the within instrument, and he acknowledged that he executed the same," etc. The certificate is signed "N. L. Palmer, notary public in and for said Fresno county, state of California." The mortgage was recorded April 5, 1895, with no other affidavit or acknowledgment. When offered in evidence at the trial the mortgage had written thereon the affidavit of Peter Alferitz (the mortgagee) in due form as required by the statute, and was subscribed and sworn to before a notary public November 18, 1896. The mortgage was not recorded after this affidavit was attached to it. There is nothing to show that defendant had any knowledge of this mortgage, or of the transaction out of which it arose, except such as the recording imparted. The attachment suit was commenced April 1, 1897. After the attachment proceedings had been commenced, and after the sheep were thereunder attached, the mortgagors made another mortgage (presumably on the same and other sheep) to secure the note mentioned in the mortgage already referred to and some other indebtedness.

The court found that plaintiffs' testate "is not and never was the owner or in the possession of any of the property described in the amended complaint," and that defendant

did not deprive him of the use or possession of said property; and, as conclusion of law, that the alleged mortgage of "April 3, 1895, was, as to said Emil Grunig, null and void and of no effect," and that said Emil Grunig was "entitled to have said sheep attached upon the said indebtedness," etc.

Respondent urges several objections to the mortgage as affecting the right of defendant to attach and sell the sheep in question. It is not necessary to notice all of these alleged defects.

When the mortgage was recorded it had attached to it no affidavit of the mortgagee, or of any person on his behalf, stating that the mortgage was made in good faith and without any design to hinder, delay or defraud creditors. Subdivision 1, section 2957, of the Civil Code reads as follows: "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless: 1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors."

This section of the code requires the affidavit of all the parties to the mortgage to accompany it when recorded, but not necessarily all the members of a corporation or copartnership where the mortgage is made to or by such corporation or copartnership. (*Modesto Bank v. Owens*, 121 Cal. 223.)

The subsequent affidavit made by the mortgagee without recording the instrument was not a compliance with the statute and gave no additional validity to the mortgage; and had it been recorded after the affidavit of the mortgagee was attached thereto, it would have been notice only from the date of recordation. The creditors of the mortgagors had notice of no other mortgage than such as they found recorded, and, lacking as it did the essential already pointed out, they could proceed by attachment against the property then in possession of the mortgagors regardless of the alleged lien.

The judgment is affirmed.

[Sac. No. 708. Department Two.—November 10, 1900.]

S. L. N. ELLIS, Respondent, v. E. M. JEFFERDS, Auditor of Tulare County, Appellant.

PUBLIC OFFICER—SUPERVISOR'S SALARY—COUNTY OF ELEVENTH CLASS—COUNTY GOVERNMENT ACTS OF 1893 AND 1897.—A supervisor of a county of the eleventh class, who was elected under the County Government Act of 1893, under which his salary was fixed at the sum of eighteen hundred dollars per annum, and who was in office at the time of the enactment of the County Government Act of 1897, under which his county became one of the thirteenth class and by which the salary of supervisors was fixed at one thousand dollars per annum, continues to be entitled, under section 233 of the latter act, to the salary provided by the act of 1893; and the fact that since the passage of the latter act he had received warrants only for the amount of the salary therein provided, upon the refusal of the auditor to issue them for the amount provided by the act of 1893, does not estop him from demanding the balance.

APPEAL from a judgment of the Superior Court of Tulare County and from an order refusing a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion.

J. A. Allen, and George G. Murry, for Appellant.

William W. Cross, T. E. Clark, and F. B. Howard, for Respondent.

SMITH, C.—The case is an application for a writ of *mandamus* to the auditor of Tulare county, requiring him to issue to the plaintiff a warrant for the sum of eleven hundred and thirty-three and one-third dollars, the balance due on account of salary as supervisor and road commissioner for the period commencing with the first Monday in June, 1897, and ending with the first Monday in November, 1898.

The plaintiff was elected under the County Government Act of 1893; under which, as supervisor of a county of the eleventh class, his salary was fixed at the sum of eighteen hundred dollars per annum. (Stats. 1893, sec. 173, p. 416.)

But pending his term the County Government Act of 1897 was enacted, under which Tulare became a county of the thirteenth class, and the salary for supervisors was fixed at one thousand dollars per annum. (Stats. 1897, sec. 170. p. 522.) The case—in view I take of it—turns upon two questions, namely: Do the provisions of the latter act as to salary apply to the plaintiff's case? If not, is he estopped by his receipt of part of what was due him from demanding the balance?

1. With regard to the latter question the court in effect found that plaintiff received his warrants under an agreement with the defendant that the same were not in full settlement of plaintiff's salary, but on account, etc. It is claimed that the evidence is insufficient to justify this finding; but the question I regard as immaterial. The plaintiff repeatedly demanded warrants for the full amounts due him, and the defendant refused to issue warrants for greater amounts than eighty-three and one-third dollars. It was the duty of the auditor to draw his warrant for the amount due the plaintiff, and, if he was entitled to the salary prescribed by the act of 1893, the issue of warrants by the auditor for part of what was due was only a partial performance of his duty, and did not exonerate him from further obedience to the law. The agreement or understanding of the parties, as to whether the payment was in full or on account, was altogether immaterial. A somewhat similar question is decided in *Whiting v. Plumas Co.*, 64 Cal. 66. The cases cited by the appellant's counsel have no application. In *Cooley v. Calaveras County*, 121 Cal. 482, there had been a settlement of a claim against the county between the plaintiff and the board of supervisors, which it was held was conclusive on the parties, though made under a mistake of law. The decision goes at least as far as the law can well go (Civ. Code, sec. 1578, subd. 1), but it does not extend to a transaction between a creditor of the county and the auditor; whose functions are different from those of the supervisors with reference to claims against the county. The case of *Coyne v. Rennie*, 97 Cal. 590, was also a different case. There the question was simply as to the validity of an ordinance reducing the plaintiff's salary, and it was held the ordinance was valid.

2. The other question involved presents no difficulty. By section 233 of the act of 1897 it is expressly provided that "the provisions of sections 158 to 214, inclusive, of this act, so far as they change the compensation of any officer therein named, heretofore paid a fixed salary, etc., and not fees or per diem, shall not affect incumbents unless otherwise provided in any of said sections." (Stats. 1897, p. 577.) This includes section 170, at the end of which is the provision: "This section shall take effect immediately" (page 523; which it is claimed withdraws the officers named in the section from the operation of section 233. But this contention cannot be sustained. The two sections must be read together, and when so read their meaning is clear. By the provision at the end of section 170—if constitutional—that section went into effect immediately, but under section 233 the case of officers receiving fixed salaries was not affected. (*McCabe v. Jefferds*, 122 Cal. 302; *County of Tulare v. Jefferds*, 118 Cal. 361; *Cody v. Murphey*, 89 Cal. 522; *People v. Henshaw*, 76 Cal. 436.)

The judgment and order appealed from should be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. Nos. 728, 729, 730, 756. Department Two.—November 10, 1900.]

ALTA McPHAIL, Respondent, v. E. M. JEFFERDS, Auditor, etc., Appellant. T. E. CLARK, Respondent, v. E. M. JEFFERDS, Auditor, etc., Appellant. W. M. De WITT, Respondent, v. E. M. JEFFERDS, Auditor, etc., Appellant. GEORGE L. BLISS, Respondent, v. E. M. JEFFERDS, Auditor, etc., Appellant.

PUBLIC OFFICERS—DEPUTIES—COUNTY OF ELEVENTH CLASS—COUNTY GOVERNMENT ACTS OF 1893 AND 1897.—The deputy district attorneys, the deputy county superintendent, and the deputy county

clerk of a county of the eleventh class, which officers were provided for by section 173 of the County Government Act of 1893 and their salaries fixed, and who were in office at the time of the enactment of the County Government Act of 1897, remain entitled, under section 233 of the latter act, to the payment of their salaries by the county. The latter act does not contemplate that their salaries should be paid by their respective principals.

APPEALS from judgments of the Superior Court of Tulare County in appeals numbered Sac. 728, 729, and 730, and from a judgment of said court and from an order denying a new trial in appeal numbered Sac. 756. W. B. Wallace, Judge.

The facts are stated in the opinion, and in the opinion in *Ellis v. Jeffers*, ante, p 478.

J. A. Allen, and George G. Murry, for Appellants.

William W. Cross, F. B. Howard, and T. E. Clark, for Respondents in Appeals Numbered Sac. 729 and 730.

Charles G. Lamberson, and M. E. Power, for Respondents in Appeals Numbered Sac. 728 and 756.

THE COURT.—These cases were submitted by stipulation, along with *Ellis v. Jeffers*, ante, p. 478, on briefs on file. The only difference between the cases is that the plaintiffs here are deputy officers, viz., Clark and De Witt deputy district attorneys, McPhail deputy county superintendent, and Bliss deputy county clerk. We do not, however, regard this difference as material. Under section 173 of the act of 1893 these deputies are all provided for, and their salaries fixed.

Under the act of 1897, by section 59, which is a re-enactment of section 61 of the old act, the new officers have the same power as before to appoint deputies. But by section 215 they are to be paid by their principals, whose salaries are increased. The office is, therefore, not abolished, but the compensation of the deputies is changed. Their cases, therefore, comes fairly under the language of section 233, and certainly within the intention of the act. To deprive the incumbent district attorney of his paid deputies, and to re-

quire him to pay for necessary assistance out of his own pocket, would be very materially to "affect" him.

The cases, we think, cannot be distinguished from the principal case, and on the authority of that case the judgments and orders appealed from are affirmed.

[S. F. No. 1687. Department One.—November 10, 1900.]

HANNAH GREEN, Appellant, v. R. S. THORNTON et al.,
Respondents.

RES ADJUDICATA—PARTIES AND PRIVIES BOUND—DIFFERENT CAUSE OF ACTION.—The right, question, or fact definitely put in issue, and finally determined by a court of competent jurisdiction, cannot be contested in a subsequent action between the same parties or their privies, even if the second suit is for a different cause of action.

ID.—ACTION TO QUIET TITLE—FORMER ADJUDICATION—EJECTMENT SUIT BY PLAINTIFF'S GRANTOR.—In an action to quiet title, the principles adjudicated in a former action of ejectment brought by plaintiff's grantor against the same defendant are binding upon the plaintiff, where it appears that substantially the same evidence, documentary and parol, was introduced and considered in both cases, and the plaintiff relied upon the same title which was adjudicated against his grantor in the action of ejectment.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

T. M. Osmont, for Appellant.

Edward F. Fitzpatrick, B. B. Newman, and M. B. Kellogg,
for Respondents.

VAN DYKE, J.—This is an appeal from an order denying plaintiff's motion for a new trial. The action is to quiet title to the premises in question situated in San Mateo County. In addition to the usual allegations in a complaint in such ac-

tion, the plaintiff avers, among other things, that on the first day of April, 1872, B. S. Green, since deceased, then the husband of plaintiff was the owner and in possession of the lands and premises in question, and was then indebted to one John McCombe in a large sum of money; that on said date an action was commenced by said McCombe against said Green and the plaintiff to recover the amount due, in which action attachment was issued and levied upon said premises; that thereafter, on the fifth day of November, 1880, judgment was regularly entered in said action in favor of the plaintiff therein, McCombe, and against defendant, B. S. Green, former husband of the plaintiff herein, for the sum of two thousand five hundred and twenty-one dollars and twenty cents, upon which execution was issued to the sheriff of San Mateo county under which writ the said land and premises were duly levied upon on the sixteenth day of November, 1881, and thereafter sold, in accordance with law, on the tenth day of December, 1881, and purchased at said sale by one Alexander Forbes; that thereafter, on the fourth day of June, 1887, the sheriff's deed was duly executed and delivered to one C. P. Robinson, the assignee of said Forbes, and that the title so acquired by said Robinson has by mesne conveyance passed to and is now vested in the plaintiff. It is further averred that on the seventeenth day of August, 1872, the said B. S. Green executed to the defendant herein, Thornton, a conveyance of said land and premises, but at the time said Green was largely involved in debt and actually insolvent, and that for the purpose of avoiding the payment of his debts and screening and covering up said propeerty, and of hindering and delaying and defrauding his creditors, said deed was executed, and that defendant Thornton was aware of said indebtedness and of the purpose of said Green in making said conveyance, and accepted said conveyance for the express purpose of enabling said Green to hinder, delay, and defraud his creditors; that said Thornton would hold the ostensible title to said premises until the debts against said Green should be barred by the statute of limitations, and thereupon that he would reconvey the same to Green; that no other consideration passed between the said parties for the said conveyance, and that said conveyance operates as a cloud upon plaintiff's title.

The defendant, in addition to answering the allegations of the complaint, by way of cross-complaint, sets up his deraignment of title to said premises, in which it is alleged that he entered into possession of the premises in question under the deed from Green in 1872, and has remained in possession ever since, claiming title thereto in his own right, paying all taxes assessed and levied thereon, and exercising other acts of ownership. The findings of the court are against the plaintiff, and sustain the averments of defendant's cross-complaint. These findings are supported by the evidence.

The contest in relation to the premises in question, in its various forms, has been in this court on several different occasions—in fact it has become a sort of "*Jarndyce v. Jarndyce*." (*Hyde v. Thornton*, 83 Cal. 83; *Hyde v. Boyle*, 86 Cal. 352; 89 Cal. 590; 93 Cal. 1; 105 Cal. 102; *Robinson v. Thornton*, 102 Cal. 675; 114 Cal. 275; 129 Cal. 12.) In the view we take of the case it is unnecessary to consider the several preliminary objections raised on the part of respondent, for on the merits the case is against the appellant.

The plaintiff relies upon possession and the title derived under the sale of the premises in the action of *McCombe v. Green*. In *Robinson v. Thornton*, *supra*, in reference to this title, it is said: "Judgment was not rendered in the action of *McCombe v. Green* until November 5, 1880, and at the date of sale thereunder, December, 1881, the judgment debtors had no interest in the land upon which the judgment could be a lien; and as their interest in the land that was attached had been extinguished, and as with its extinguishment the lien of the attachment upon that interest was also extinguished, the land was not subject to sale in satisfaction of the judgment. . . . Green himself would be estopped by his deed (to Thornton) from claiming any title in the land, and as whatever title Green had at the date of the judgment had been extinguished prior to the time when Thornton took possession of the land, the lien of the attachment against his interest was terminated and could no longer form the basis for the support of any sale that might be made under the judgment afterward obtained in the action." (See, also, the same case on a subsequent appeal, 114 Cal. 275.)

Although the action of *Robinson v. Thornton, supra*, was ejectment and this is an action to quiet title, the same evidence substantially, documentary and parol, was introduced and considered in both cases, and the principles laid down in that case bind the plaintiff in this, being the successor in interest of Robinson. In *Southern Pac. R. R. Co. v. United States*, 168 U. S. 1, it is said: "The general principle announced in numerous cases in this court is that the right, question, or fact, definitely put in issue and directly determined by the court of competent jurisdiction as a ground of recovery, cannot be contested in a subsequent dispute between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order, or the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect to all matters of property put in issue and actually determined by them."

The books are full of cases in the same line, but it is altogether unnecessary to cite more of them. The court was, therefore, justified in finding that the plaintiff had no title to the premises in controversy; and, as already stated, the court also found from the evidence that the plaintiff was not in possession or entitled to the possession, but, on the contrary, that "on said eighteenth day of August, 1872, said Thornton entered into the possession of said lands and premises, and has ever since been in possession thereof, claiming title thereto," and was at the time of the commencement of the action, and for a long time prior thereto, the owner and seised in fee simple, and in possession and entitled to the possession, of said property and premises.

The appellant's point that the court erred in excluding the

deed from H. C. Hyde, assignee in bankruptcy of W. Ford. to Robinson is not well taken, as for the reason stated in the defendant's objection to the introduction of said deed the ruling of the court was correct.

The order appealed from is affirmed.

Garoutte, J., and Harrison, J., concurred.

Hearing in Bank denied.

[Crim. No. 147. In Bank.—November 10, 1900.]

In the Matter of the Disbarment of Z. F. WHARTON.

ATTORNEY AT LAW—JUDGMENT OF DISBARMENT—AFFIRMANCE ON APPEAL—MODIFICATION.—A judgment of the superior court, disbarring an attorney, which has been affirmed by the supreme court, cannot be modified by the latter court after the issuance of the *remittitur*. An application for a modification should be made to the superior court.

APPLICATION to the Supreme Court to set aside a judgment of disbarment.

The facts are stated in the opinion of the court.

J. H. Liggett, W. H. Layson, and E. C. Hart, for Appellant.

S. Solon Holl, W. P. Harlow, and Clinton E. White for Respondent.

THE COURT.—Application to set aside the judgment of disbarment.

The petitioner was accused before the superior court of the county of Sacramento of the violation of his oath and duty as an attorney and counselor at law, and, after a hearing thereon that court entered its judgment August 15, 1895, permanently precluding him from practicing as such attorney or counselor in all the courts of this state. Upon an appeal therefrom the judgment was affirmed by this court. (*In re Wharton*, 114 Cal. 367.) An application has now been

made in his behalf by a large number of attorneys to set aside this judgment of disbarment.

As the original proceedings for the disbarment were had and determined before the superior court, any application for a modification or change in its judgment should be made in that court. The judgment was rendered by the superior court after hearing evidence upon the matters charged in the accusation, and the action of this court was limited to an examination of the sufficiency of the evidence to sustain the finding and a review of such errors of law as were presented in the transcript brought here upon the appeal. It would be an invasion of the proper function of the superior court if we should now attempt to modify its judgment at the request of persons who do not appear to have had any connection with the former proceedings, and without any proof of the facts alleged as the basis of their request. As in the case of any other appeal, upon the issuance of the *remittitur* to the court below the jurisdiction of this court over the judgment ceased. The judgment itself, as well as the other proceedings had in the matter, are a part of the records of that court and under its control, and if any matters have transpired since its entry which would authorize or justify the modification now sought, a motion therefor should be presented to the tribunal which has control of the records, upon such notice as to it may seem suitable.

For these reasons the application is denied.

[Crim. No. 663. Department One.—November 13, 1900.]

THE PEOPLE, Respondent, v. HIERONYMUS HARTMAN, Appellant.

JURY—CHALLENGE TO PANEL—BIAS OF SHERIFF—APPEAL.—Upon a challenge to the panel of trial jurors, on the ground that the sheriff who summoned them was biased, the condition of mind of that officer is a question of fact for the trial court, and the denial of the challenge will not be reviewed on appeal when the evidence as to his mental condition is conflicting.

CRIMINAL LAW—BIGAMY—GENERAL REPUTE OF MARRIAGE.—Under section 1106 of the Penal Code, in a prosecution for bigamy, general repute of marriage is admissible in evidence as a circumstance tending to show the fact of marriage.

ID.—BELIEF OF INVALIDITY OF FIRST MARRIAGE—INSTRUCTIONS.—In such a prosecution, in which the second marriage is admitted, and the defendant fully knew what he was doing when he entered into it, the fact that at that time he honestly believed that he had not been married to the woman who was then his wife does not authorize his acquittal, and a requested instruction to that effect is properly refused. Under such circumstances, it was the act of marrying the second time that constituted the crime.

ID.—SUFFICIENCY OF EVIDENCE OF BIGAMY.—In a prosecution for bigamy, evidence tending to show cohabitation between the defendant and woman for a great many years, undivided general repute of their marriage, admissions by the defendant of marriage and some direct evidence tending to show the performance of an actual marriage ceremony, is sufficient to support a finding of fact that the marriage relation did exist between them.

ID.—ABSTRACT INSTRUCTION—PRIOR COHABITATION.—While, as an abstract proposition of law, evidence of the cohabitation of the defendant with another woman, prior to his alleged second marriage is not sufficient, in a prosecution for bigamy, to warrant the jury in finding that the defendant was ever married to such a woman, the refusal of the court to so instruct is not error, when there is much other evidence tending to show the marriage.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order refusing a new trial.
John L. Campbell, Judge.

The facts are stated in the opinion of the court.

Byron Waters, for Appellant.

Tirey L. Ford, Attorney General, and Henry A. Melvin, Deputy Attorney General, for Respondent.

GAROUTTE, J.—Defendant has been convicted of the crime of bigamy and appeals to this court.

It is first insisted that the challenge to the panel of jurors should have been allowed. The challenge was based upon the claim that the sheriff who summoned the jurors was biased. This officer was placed upon the stand and examined at length as to his state of mind, and we will not here detail his evidence. It may be conceded that it is not en-

tirely explicit, and possibly is contradictory to some extent, yet he testifies that he had "no opinion as to whether or not the defendant was the husband of Mrs. Hartman," and that issue was the principal issue in the case. The condition of mind of this officer was essentially a question of fact for the trial court to pass upon, and, as in the case of a trial juror challenged upon the ground of actual bias, it is only when the issue comes before this court as matter of law that it has jurisdiction to deal with it. Here the evidence is of a character that concludes us in holding that the denial of the challenge presents only an issue of fact. Under these conditions the action of the trial court will be upheld.

In this case the second marriage is conceded, and the material issue presented at the trial was: Had the defendant a wife living at the time of the second marriage? A great mass of evidence was introduced directed to that issue. Objection was made to testimony tending to show by general repute the relationship existing between the defendant and the woman, Mrs. Hartman, whom it was claimed was his first wife, in the communities where they had previously resided. While we do not decide here that this marriage could be shown by general repute alone, yet we are satisfied general repute is admissible as a circumstance tending to show marriage. It is said in *People v. Beevers*, 99 Cal. 289: "It is conceded everywhere that an actual marriage must be proven to support the charge of bigamy, a great number of the cases holding that cohabitation and repute, standing alone, are not sufficient to prove the marriage. This was the common law, and was based upon the principle that the presumption of innocence of crime overcame the presumption of marriage following cohabitation and repute. Many cases hold that the admission of marriage by a defendant, coupled with cohabitation and repute, are sufficient to sustain a finding of actual marriage." Again, section 1106 of the Penal Code provides: "Upon a trial for bigamy it is not necessary to prove either of the marriages by the register, . . . but the same may be proved by such evidence as is admissible to prove a marriage in other cases." There can be no question but that the legislature has power to prescribe rules of evidence in prosecutions for the crime of bigamy. And if the rule, as the sec-

tion says, is the same in criminal cases as in civil cases, then general repute of marriage may be proven as tending to show the fact of marriage. That this is the rule in civil cases is expressly decided in *White v. White*, 82 Cal. 427, where *Case v. Case*, 17 Cal. 598, is reviewed and explained. For the reasons suggested, we are clear the evidence was admissible. At this point it may be further indicated that in the present case we have evidence tending to show cohabitation for a great many years, undivided general repute of marriage, admissions by defendant of marriage, and some direct evidence tending to show the performance of an actual marriage ceremony. These things, taken together, are ample to support a finding of fact that the marriage relation did exist between the defendant and the aforesaid Mrs. Hartman.

The court properly refused the following instruction: "Bigamy, like other crimes, is the result of a joint operation of act and intent; and if you believe from the evidence that the defendant, at the time he married Nancy Brown, honestly believed that he had not been legally married to Mary Powers you will acquit the defendant." The second marriage is conceded, and it is contended that the foregoing instruction should have been given as bearing upon defendant's intent. It is claimed that if defendant thought he was not married when he entered the marriage relation the second time, then he had no intent to commit the crime of bigamy, and having no intent to commit the crime he could not, as matter of law, be guilty of committing it. While this position is plausible, it is apparent that it cannot stand when the tests furnished by the law are applied to it. It is said in *People v. O'Brien*, 96 Cal. 176: "It is a familiar rule that to constitute a crime there must be a union of act and intent, but our code provides that the word 'willfully,' when applied to the intent with which an act is done or committed, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." This whole contention is in the O'Brien case well discussed, and the authorities cited. It is there again said (quoting from 2 Wharton's Criminal Evidence, 8th ed., sec. 1695a): "It has been held that one who marries a second

time, under the honest but erroneous belief that a decree of divorce which had been granted was valid, is afforded no protection by the invalidity of the decree, and that evidence of his good faith will be excluded."

In *Commonwealth v. Thompson*, 6 Allen, 592,¹ the court said: "The court properly refused to rule that upon the mere showing that the plaintiff married the said Emelie B. Carlton and cohabited with her without any knowledge that she had a husband living, and believed that she had no husband living, the defendant could not be convicted of adultery, although she then had a legal husband in full life." In *Commonwealth v. Mash*, 7 Met. 472, the syllabi correctly states the case as follows: "If a woman who has a husband living marry another person, she is punishable though her husband has voluntarily withdrawn from her, and remain absent unheard of for any term of time less than seven years, though she honestly believes at the time of her second marriage that he is dead." In *Rey v. Gibbon*, 12 Cox. C. C. 237, it is said: "A *bona fide* belief by a wife that her husband is dead is no defense to an indictment of bigamy unless he has been continuously absent for seven years." This court has also decided many analogous cases under statutes relating to the seduction or rape of girls under the age of consent.

To support appellant's contention in the foregoing regard he relies upon *People v. Harris*, 29 Cal. 678, where the defendant was found guilty of voting twice at the same election. In that case it was held that if the defendant was so drunk when he voted the second time that he did not know what he was doing, then he was not guilty. In other words, in substance it was held that if he was unconscious at the time that he cast the second vote, he was not responsible under the criminal law for the act done. But that case is not in point here. The law says: "Every person, having a husband or wife living, who marries any other person, except in the cases specified in the next section, is guilty of bigamy." If defendant, by reason of being unconscious, did not know what he was doing when he contracted the second marriage, then this case is similar to the Harris case. But here the defendant did know exactly and fully what he was doing when

¹ 83 Am. Dec. 653.

he married the second time, and it was the act of marrying the second time that constituted the crime, for, as we have seen, he had another wife living when he contracted the second marriage. The intent of defendant, as referred to in the code, is the intent to do the act, namely, contract the marriage. It does not refer to any intent to violate the law.

The court refused to give the following instruction: "Evidence of cohabitation of defendant with Mary Powers, prior to the marriage of defendant with Nancy Brown, is not evidence sufficient to warrant you in finding that the defendant was ever married to Mary Powers." The statement as an abstract proposition is true. But, as we have seen, there was much other evidence tending to show a marriage of defendant with Mary Powers. For these reasons the court was justified in declining to give the instruction as asked.

The judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

[L. A. No. 917. Department One.—November 19, 1900.]

MINNIE J. EACHUS et al., Respondents, v. CITY OF LOS ANGELES, Appellant.

CONSTITUTIONAL LAW—DAMAGE TO PRIVATE PROPERTY—LIABILITY OF CITY—EXCAVATION OF STREET TO OFFICIAL GRADE.—Under section 14 of article I of the constitution of 1879, private property cannot be damaged for public use without just compensation; and a city is liable thereunder for damage caused to the owner of an abutting lot by excavating the street in front thereof, in pursuance of a contract let by the city for that purpose.

Id.—ACTION FOR DAMAGES—CONSTRUCTION OF PLEADING—DEPRIVATION OF ACCESS—DESTRUCTION OF VALUE—UNCERTAINTY—WAIVER.—In an action by the owner of a lot abutting upon a street and alley for damage caused by the city in grading, a complaint averring that the grading "rendered access to plaintiff's said property by said street and alley impossible, and utterly destroyed the value thereof," is to be liberally construed as imparting destruction of

the value of the property, and not merely of the value of the access; and any uncertainty in the complaint was waived by failure to demur specially thereto.

1D.—ANSWER—MOTION TO STRIKE OUT EVIDENCE—OBJECTION TO COMPLAINT AT TRIAL.—Where the city in its answer took issue upon the destruction of the value of the property, a motion to strike out all evidence tending to prove damage to the lot other than by cutting off access thereto, on the ground that the complaint did not allege any other damage, was properly denied. On the trial no objection to the complaint can be considered, unless it goes to the want of jurisdiction, or to the insufficiency of the complaint to state a cause of action.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. J. W. Mahon, Judge presiding.

The facts are stated in the opinion.

Walter F. Haas, City Attorney, for Appellant.

The complaint must be construed most strongly against the pleader. (*Rogers v. Shannon*, 52 Cal. 99; *Collins v. Townsend*, 58 Cal. 608; *Hays v. Steiger*, 76 Cal. 560; *People v. Wong Wang*, 92 Cal. 277; *Triscony v. Orr*, 49 Cal. 612; *Callahan v. Loughran*, 102 Cal. 476; *Rogers v. Kimball*, 121 Cal. 247.) The facts upon which plaintiff relies for recovery must be clearly stated and not be left to inference. (*Moore v. Besse*, 30 Cal. 572; *Gates v. Lane*, 44 Cal. 397; *Stringer v. Davis*, 30 Cal. 318; *Burkett v. Griffith*, 90 Cal. 541.¹) A complaint can only be aided by affirmative averments in the answer, and not by mere denials. (*Shively v. Semi-Tropic Land etc. Co.*, 99 Cal. 259; *Cohen v. Knox*, 90 Cal. 275; *Schenck v. Hartford Ins. Co.*, 71 Cal. 28; *Daggett v. Gray*, 110 Cal. 169.) The city is not liable for acts done by it as the agent for the public in passing an ordinance establishing an official grade, and directing grading to be done in accordance therewith. (*Eachus v. Los Angeles Electric Ry. Co.*, 103 Cal. 618²; *Bancroft v. San Diego*, 120 Cal. 432.) The contractor is not an agent of the city, and he is answerable for any resulting damage when he takes the contract. (*Cole-*

¹ 25 Am. St. Rep. 151.

² 42 Am. St. Rep. 149.

grove v. Smith, 102 Cal. 223; *Sievers v. San Francisco*, 115 Cal. 648.³)

E. Edgar Galbreth, and D. C. Morrison, for Respondents.

In this state, under the constitution of 1879, and in all other states, which have similar constitutional provisions, cities are liable for any damage to private property sustained by the grading of a street. (Const., art. I, sec. 14; *Reardon v. San Francisco*, 66 Cal. 506⁴; *Bigelow v. Los Angeles*, 85 Cal. 618; *Eachus v. Los Angeles etc. Ry. Co.*, 103 Cal. 614⁵; *Atlanta v. Green*, 67 Ga. 386; *Moore v. Atlanta*, 70 Ga. 614; *Shawneetown, v. Mason*, 82 Ill. 342⁶; *Elgin v. Eaton*, 83 Ill. 535⁷; *Rigney v. Chicago*, 102 Ill. 64-80; *Chicago v. Taylor*, 125 U. S. 161; *Foster v. St. Louis*, 71 Mo. 157; *Werth v. Springfield*, 78 Mo. 107; *New Brighton v. United Presby. Church*, 96 Pa. St. 331; *Hendrick's Appeal*, 103 Pa. St. 358; *Sheehy v. Kansas City Cable Ry Co.*, 94 Mo. 574.⁸) Plaintiff was entitled under the complaint to recover the entire damages sustained to the house and lot by reason of making the excavation in the street. (*Eachus v. Los Angeles etc. Ry. Co.*, *supra*; *Lake Erie etc. R. R. Co. v. Scott*, 132 Ill. 429; *Denver v. Bayer*, 7 Colo. 113.)

COOPER, C.—This appeal is from a judgment in favor of plaintiffs and from an order denying defendant a new trial.

The action was brought to recover damages caused by the excavation of First street in front of plaintiff's lot. Plaintiffs were the owners of a lot in the city of Los Angeles, bounded on the east by Boylston street, on the west by an alley, and on the south by First street, said lot being a rectangle fifty feet wide by one hundred and forty-two feet long running lengthwise along the north side of First street. The defendant, by ordinance duly adopted, established the grade of said First street some twenty-eight feet lower than the surface of plaintiffs' lot, and in pursuance of said ordinance preceeded to and did excavate said First street and remove the earth therefrom to the official grade, and up to the south

³ 56 Am. St. Rep. 153.

⁴ 56 Am. Rep. 109.

⁵ 42 Am. St. Rep. 149.

⁶ 25 Am. Rep. 321.

⁷ 25 Am. Rep. 412.

⁸ 4 Am. St. Rep. 396.

line of plaintiffs' lot, the full length thereof. The grading of said street resulted in leaving the plaintiffs' lot on the north side of said street some twenty-eight feet above the official grade, thus cutting off plaintiffs' access to their said lot and tending to depreciate the value thereof. The court found the plaintiffs' damage to be twelve hundred dollars.

It is claimed that the city, as a municipal corporation, is not liable to the owners of adjoining lots by reason of the excavation of the public streets of the city to the official grade. This, no doubt, was the rule under the former constitution of 1849, article I, section 8—"nor shall private property be taken for public use without just compensation." in 1879 the present constitution was adopted by the people and the provision was changed so as to read, "private property shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner." (Const., art. I, sec. 14.) Under the above provision of our fundamental law it has been settled in this state—and in accord with the great weight of authority in other states under similar constitutional provisions—that the municipality is liable for damage caused to the owner of an abutting lot by excavating a street in front thereof. (*Eachus v. Los Angeles etc. Ry. Co.*, 103 Cal. 614.⁹) In the *Eachus* case the authorities are reviewed at length and the reasons for the rule stated, and we deem it unnecessary to repeat them here. The remedy is not against the contractor unless he departs from the line of the official grade. The city, in the establishment of the official grade of a public street and in excavating and grading the street to the official grade, acts through its legally elected and qualified officers. When it lets a contract for the grading of the streets, which it had the authority and power to let, it assumes the responsibility of paying all damages necessarily caused to private property by such grading. If the contractor should, of his own violation, go beyond his contract, either in the width or depth of the grade, or perhaps in other respects, the rule would be different.

Defendant made a motion to strike out all the evidence of plaintiffs tending to prove damages to the lot from any other cause or reason than by cutting off the access thereto. This

⁹ 42 Am. St. Rep. 149.

motion was denied, and defendant now claims that such ruling was error. Defendant's contention is that the complaint does not allege damage in any other manner or way than that the grading rendered the street impassible and cut off access to plaintiffs' property. We do not think the complaint susceptible of such narrow construction. It alleges that the grading "rendered the said Boylston street and said alley useless and impassible and rendered access to plaintiffs' said property by said street and alley impossible, and utterly destroyed the value thereof, to the damage of plaintiffs in the sum of three thousand dollars." The words "value thereof" were evidently intended by the pleader to refer to the antecedent property. The most that can be said is that the sentence is somewhat ambiguous. This could have been reached by special demurrer, but no special demurrer was interposed, and we think the pleading sufficient as the record appears. The only demurrer was a general one, and upon this being overruled the defendant answered. In the answer defendant denied "that it utterly destroyed the value of either said property or said alley or streets, or either of them, either to plaintiffs' damage in the sum of three thousand dollars, or any damage, or at all, . . . or that it damaged plaintiffs' property, or any property, or the property in said complaint described, either in the sum of three thousand dollars, or in any other sum, or at all." It thus appears that the defendant did not raise the point by demurrer as to the ambiguity of the complaint. That it understood the complaint to allege that the value of the property was destroyed, when it denied in its answer that it destroyed the value. Pleadings under our system must be liberally construed with a view to substantial justice between the parties. (Code Civ. Proc., sec. 452.)

It is the duty of the court at every stage of the proceedings to disregard any defect in the pleadings which in the opinion of the court does not affect the substantial rights of the parties. (Code Civ. Proc., sec. 475.) If a complaint is defective in form and not in substance, such defect can be reached only by special demurrer that the complaint is ambiguous or uncertain. (*Merritt v. Glidden*, 39 Cal. 564.¹⁰) On the trial

¹⁰ 2 Am. Rep. 479.

no objection to the complaint is open to inquiry except the want of jurisdiction, or that it does not state facts sufficient to constitute a cause of action. (*Tennant v. Pfister*, 45 Cal. 272.)

It follows that the judgment and order should be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison J., Van Dyke, J., Garoutte, J.

[L. A. No. 622. Department One.—November 19, 1900.]

EMMA H. WOODHAM, Respondent, v. J. C. CLINE and
NILES PEASE, Appellants.

STATUTE OF LIMITATIONS—OMISSION TO FIND UPON PLEA—FACTS SHOWING ACTION NOT BARRED.—The failure of the court to find upon a plea of the statute of limitations set up in the answer of the defendants, is not ground for a reversal of the judgment upon appeal where the facts found or admitted show that the action was not barred.

ID.—RUNNING OF STATUTE—ACTION FOR CONVERSION—AMENDMENT OF COMPLAINT—ORIGINAL AVERMENTS OF TRESPASS—SURPLUSAGE.—The statute of limitations for the wrongful conversion of personal property will not run after the commencement of an action to the date of filing an amended complaint, where the original complaint stated the same cause of action, though it superadded thereto averments showing a trespass upon plaintiff's property. Such averments of trespass may be regarded as surplusage.

DEFENSE TO ACTION—ABSENCE OF FINDING—BURDEN OF PROOF—ABSENCE OF EVIDENCE—APPEAL.—Where the answer pleads an affirmative defense to the action, upon which the defendants have the burden of proof, if no evidence is produced in support of it, any finding made must have been against them; and the defendants cannot complain upon appeal from the judgment of the absence of a finding upon such defense, if there is no evidence in the record to sustain it.

APPEAL from a judgment of the Superior Court of Los Angeles County. W. H. Clark, Judge.

The original complaint, in addition to the averments of conversion of personal property set forth in the opinion, alleged that defendants wrongfully, willfully, and maliciously entered her house, which she held under leasehold, by force, and tore up the carpets and draperies, and injured the plaintiff's property. Further facts are stated in the opinion.

Mulford & Pollard, for Appellants.

S. V. Landt, and McLachlan, Cohrs & Landt, for Respondent.

COOPER, C.—This action was brought to recover the value of personal property alleged to have been converted by defendants. The court filed findings upon which judgment was entered for plaintiff. This appeal is from the judgment upon the judgment-roll.

The only point urged on this appeal is that the court failed to find upon the pleas of the statute of limitations set up in defendants' answers. It is alleged in the answers that the defendant Pease brought suit against May and Alice Richards, and procured a writ of attachment against them, which writ was delivered to defendant Cline, as the sheriff of Los Angeles county, and that on the twenty-first day of April, 1894, the said property was taken by defendant Cline as such sheriff, in his official capacity, under and by virtue of the said writ of attachment, as the property of said May and Alice Richards. It is further alleged in the answers that the action is barred by the provisions of subdivision 2, section 339, and subdivision 1, section 341, of the Code of Civil Procedure.

It is provided in said subdivision 2, section 339, that an action must be commenced within two years "against a sheriff. . . . upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office." This action was commenced when the original complaint was filed April 10, 1896. The complaint and the answers allege, and the court found, that the taking was on the twenty-first day of April, 1894. This shows conclusively that the cause of action is not barred by subdivision 2, section 339, of the Code of Civil Procedure. It is not necessary that the court find ex-

pressly as to the statute of limitations, where the facts found or admitted show that the action is not barred. (*Ready v. McDonald*, 128 Cal. 663, and cases cited.)

It is provided in subdivision 1, section 341, of the Code of Civil Procedure, that an action must be commenced against an officer within six months, "to recover any goods . . . or other property, seized by such officer in his official capacity as tax collector." While defendants made the broad statement, in their answers, that the action is barred by the above subdivision of said section 341 (it is nowhere alleged or shown that the property was taken by either of the defendants as tax collector. On the contrary, as before shown, it is alleged by defendants that it was taken by defendant Cline in his official capacity as sheriff. And the court found that at the time of taking the defendant Cline was sheriff of Los Angeles county. Under this condition of the record it clearly appears that the property was not taken by Cline as tax collector. It is contended that the original complaint was not for conversion, and that, therefore, the action for conversion was not commenced until the amended complaint was filed, July 23, 1896. We have examined the original complaint, and we think it clearly appears that it attempted to set forth a cause of action for the wrongful conversion of personal property. It states that on the twenty-first day of April, 1896, the plaintiff was the owner and entitled to the possession of the personal property described in the amended complaint; that defendants on said date wrongfully took and converted to their own use all of said property, and that it was of the value of one thousand dollars. The allegations as to the wrongful entry into plaintiff's house and the trespasses therein committed may be regarded as surplusage.

Defendants further claim that they set forth in their answers affirmatively that the property was sold under order of court, and that defendant Pease became the purchaser under a judicial sale. Conceding that this constituted a defense to the action, the burden was upon the defendants to prove it. There is no evidence in this record. In the absence of evidence to support the affirmative matter set up in the answer, the finding must have been against the defendants. A party cannot be heard to complain of the absence of a find-

ing upon a material issue if the finding must have been against him upon the record as presented. (*Frantz v. Harper* (Cal., Oct. 30, 1900), 62 Pac. Rep. 603, and cases therein cited.)

We advise that the judgment be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Garoutte, J., Van Dyke, J., Harrison, J.

[L. A. No. 958. Department One.—November 19, 1900.]

LOUIS SPADER, Respondent, v. THOMAS R. McNELL,
Appellant.

PARTITION—PLEADING—LEGAL TITLE—TENANCY IN COMMON—RECORD OF LAND.—A complaint in partition alleging that the plaintiff and defendant are the owners as tenants in common of the land described, and that the whole land stands of record in the name of the defendant, but that plaintiff has an estate of inheritance therein, and is the owner of the undivided one-half thereof, and of the water stock appurtenant thereto, and that the defendant has a similar interest therein, must be construed as alleging legal and not equitable ownership in the plaintiff. The averment as to the condition of the record is consistent with plaintiff's legal ownership of an undivided half of the land by an unrecorded deed.

ID.—EQUITABLE TITLE MUST BE PLEADED—VARIANCE—OBJECTION TO PROOF.—An equitable title in the plaintiff in an action for partition must be specifically set forth in the complaint, and all the facts constituting the equity must be fully stated. If the complaint alleges legal ownership in the plaintiff, and evidence is offered to prove an equitable ownership only, there is an entire variance, which may be taken advantage of by objection that the proof is irrelevant.

APPEAL from an interlocutory judgment of the Superior Court of Ventura County. B. T. Williams, Judge.

The facts are stated in the opinion.

Blackstock & Ewing, and Edward M. Selby, for Appellant.

E. S. Hall, and Orestes Orr, for Respondent.

SMITH, C.—Appeal from an interlocutory judgment in favor of the plaintiff for the partition of a tract of eighty acres of land referred to in the testimony and the briefs as the Jackson place. The case, briefly stated, is as follows:

It is in effect found by the court that the plaintiff is the equitable owner of an undivided half of the Jackson place, and of certain water stock appurtenant thereto, under a parol contract for a conveyance from the defendant to the plaintiff, and performance on the part of the latter. But the facts constituting the equitable title found are not alleged in the complaint, and it is claimed by the appellant that the demurrer to the complaint should have been sustained, and also that the court erred in admitting evidence of the facts found.

1. The first point, I think, cannot be sustained. The material allegations of the plaintiff are "that he and the defendant are the owners as tenants in common" of the Jackson place and other lands particularly described in the complaint; and "that the whole of the above-described real estate stands of record in the county recorder's office of the county of Ventura," etc., in the name of the defendant; but that "plaintiff has an estate of inheritance therein, and is the owner of an undivided one-half part or interest of the whole of said real property and said water stock appurtenant thereto, and that the defendant . . . has a similar interest," etc.

The effect of these allegations is erroneously assumed by the appellant to be that the legal title to the land in question is in the defendant; and doubtless were this the case the complaint would, as he contends, be insufficient, for failure to set forth specifically the nature of the plaintiff's interest, and the facts constituting his equity. (Code Civ. Proc., sec. 753; *Miller v. Sharp*, 48 Cal. 394; *Freeman on Cotenancy and Partition*, 657.) But it is not alleged in the complaint that the legal title is in the defendant; but only that the land "stands of record in the county recorder's office, etc., in his name"; which is quite consistent with the plaintiff being the legal owner of an undivided half of it by unrecorded deed. The complaint must, therefore, be construed as alleging the legal ownership of an undivided half of the land in the plaintiff,

and a corresponding tenancy in common. The demurrer was, therefore, rightly overruled.

2. But there is an entire variance between the case alleged in the complaint and the evidence offered in support of it—all of which was objected to on the ground that it was irrelevant to any issue made in the case. The objection, therefore, should have been sustained.

The judgment and order appealed from should therefore be reversed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

Garoutte, J., Van Dyke, J., Harrison, J.

[Sac. No. 634. In Bank.—November 19, 1900.]

JAMES S. ANGUS et al., Executors, etc., of James G. Fair, Deceased, Appellants, v. J. W. BROWNING, President of the Board of Trustees of Reclamation District No. 108, Respondent.

RECLAMATION DISTRICT—MONEY IN POSSESSION OF PRESIDENT—PAYMENT TO COUNTY TREASURER—MANDAMUS.—A writ of mandate will not lie at the instance of a creditor of a reclamation district, the lands of which are situated in different counties, against the person who is the president of the board of trustees of the district, to compel him to pay to the treasurer of one of such counties a portion of the district funds, collected by him and in his possession as agent of the board. The making of such payment is no part of the official duty of the president, and a writ of mandate will only lie to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

APPEAL from a judgment of the Superior Court of Colusa County. H. M. Albery, Judge.

The facts are stated in the opinion of the court.

Garret W. McEnerney, Pierson & Mitchell, and Clunie & Bridgford, for Appellants.

Adams & Adams, and E. T. Crane, for Respondent.

GAROUTTE, J.—Plaintiffs sue as executors of the will of James G. Fair, deceased. The defendant is president of the board of trustees of Reclamation District No. 108—lying partly in the county of Yolo and partly in the county of Colusa. Said district is a public corporation created for public purposes, the main object being the reclamation of swamp lands. (Pol. Code, sec. 3446 et seq.; *People v. Reclamation Dist.*, 53 Cal. 346; *People v. Reclamation Dist.*, 117 Cal. 114.) The statute provides that the moneys raised by assessments on lands in such districts must be paid by the board of trustees; if the district lies partly in different counties, to the treasurer of the county in which the tracts on which assessments are collected may be respectively situated. The funds thus received into the county treasury are to be paid out “for the work of reclamation upon the warrants of the trustees, approved by the board of supervisors of the county.” (Pol. Code, secs. 3456-66.)

It is alleged in the complaint, among other things, that the said district, through its officers, levied assessments upon the lands situated therein; that lists were made showing the tracts assessed and the amount assessed against each, and that the board of trustees “turned over said lists to said Browning,” the defendant, for collection; that in his official capacity, as president of the board, defendant collected on account of said assessments the sum of thirty-seven thousand four hundred dollars; that he has not paid said sum or any part thereof to the treasurer of either Yolo or Colusa county nor to said board of trustees, but neglects and refuses so to do, “and claims the right, as president of said board, to withhold said money and pay out the same on behalf of said district as to him seems proper”; that such neglect and refusal “is now and always has been contrary to law, upheld by a majority of the board of trustees of said district.” That Fair, plaintiffs’ testator, at the time of his death, was the creditor of said district upon its warrants, regularly drawn by the board of trustees of the district, to the amount of about five thousand dollars, which warrants are still the property of his

estate, and have not been paid for want of funds applicable to that purpose; that Fair was also the owner of a body of land some ten thousand acres in area, lying within said district, which land remains the property of his estate. Plaintiffs prayed that the court determine by its judgment what portion of the said money collected by defendant should be paid to the treasurer of Yolo county, and what portion to the treasurer of Colusa county, and that defendant be required to pay over the same accordingly; that if it should appear that he is unable to comply with such direction by reason of having made unlawful use of the money, then that execution issue against his property "to satisfy said demands in favor of said district," etc.

The defendant demurred to the complaint upon various grounds, one of which was that no cause of action was stated against defendant. The demurrer being sustained, plaintiffs declined to amend, and judgment went against them. While the prayer of the pleading seeks various kinds of relief, the allegations are clear and explicit as tending directly to a decree alone that the moneys collected by defendant be paid into the respective county treasuries of Yolo and Colusa counties. In other words, the proceeding upon its face is essentially one in the nature of an application for a writ of mandate, and we are confident it must be so considered. Yet mandate is not a remedy which can be invoked against this defendant. The writ of mandate may only run to compel the performance of an act "which the law specially enjoins, as a duty resulting from an office, trust, or station." Here the law does not enjoin upon the defendant to do any act as a duty resulting from his office, trust or station. By section 3466 of the Political Code it is made the duty of the board of trustees to collect these moneys and pay them into the county treasury. The president of the board of trustees, as such, has nothing to do with it; and if the board authorize him to collect the money, and he acts under that authorization, he is a mere agent of the board and collects and holds the money as its agent.

We attach no importance to the allegation of the complaint that the defendant refused to pay over this money to the board of trustees, in view of the further inconsistent allegation that

such refusal "is now, and has always been, contrary to law upheld by a majority of the board of trustees of said district." The law casts no duty on the defendant, as president of the board of trustees, to collect this money, or to pay it when collected into the treasury of the county, and for this reason we are not able to see how the present proceedings inaugurated against defendant can stand. Viewing the case in all its substantial as a proceeding in the nature of an application for a writ of mandate, no cause of action is stated against defendant. He being the mere agent of the board in collecting the money his possession of the money is the board's possession, and this proceeding must fail for the aforesaid reasons.

The judgment is affirmed.

Harrison, J., Van Dyke, J., Temple, J., and Henshaw, J., concurred.

Rehearing denied.

[S. F. No. 1506. Department One.—November 20, 1900.]

BRIDGET QUIRK, Respondent, v. MARY ROONEY, Appellant.

RES ADJUDICATA—DECREE OF DISTRIBUTION—QUESTION OF HEIRSHIP.—

A final decree of distribution, properly entered and not appealed from, is conclusive upon the question of heirship therein adjudicated, and cannot be collaterally assailed in any other action involving the question of the heirship of the decedent.

1D.—CONCLUSIVENESS OF JUDGMENTS IN PARTITION SUIT—ALLEGED TRUST OF DISTRIBUTEE FOR HEIRS—NEW ACTION—EXPRESS TRUST.

An interlocutory judgment which has become final, and a final judgment not appealed from, in an action for partition, and to enforce a trust in favor of other alleged heirs of a deceased person, against the distributee of his estate, adjudging that such alleged heirs had no interest in the land distributed, are conclusive upon all of the claimants as to any trust of the distributee in their favor, and are a bar to a subsequent action by one of them to enforce a trust against the distributee, based upon new evidence claimed to establish an express trust of the distributee in favor of alleged heirs of the decedent, including the plaintiff.

ID.—DIFFERENT SUITS—DIFFERENT MODES OF ESTABLISHING SAME TITLE.

It is not the policy of the law to allow different suits to be brought between the same parties in regard to the same subject matter, merely because there may be different modes of establishing title to the property which is the subject matter of the different suits.

ID.—NEW ACTION UPON SAME TITLE—NEW EVIDENCE.—The doctrine of *res adjudicata* will not permit a new action to be brought for the enforcement of the same title between the same parties, merely because new and different evidence may be adduced in support of it. The plea is applicable to every matter which was open to litigation within the legitimate scope of the pleadings in the first suit, and which might have been presented with reasonable diligence upon the trial thereof.

Appeal from a judgment of the Superior Court of Humboldt County. G. W. Hunter, Judge.

The facts are stated in the opinion of the court.

J. H. McKune, McKune & George, Ernest Sevier, Denver Sevier, and Chamberlin & Wheeler, for Appellant.

Henry L. Ford, J. S. Burnell, and Frank McGowan, for Respondent.

THE COURT.—This action was brought for the purpose of having the court decree that the plaintiff is the owner of an undivided one-ninth interest in certain lands described in the complaint, and that defendant Mary Rooney holds the title thereto in trust for plaintiff. Findings were filed and judgment entered as prayed for in the complaint. This appeal is by Mary Rooney from the judgment on the judgment-roll and a bill of exceptions. The facts and history of this litigation, so far as material here, are as follows: One Bryan Lynch resided in Humboldt county and died there, being the owner of the lands described in the complaint at the time of his death. He died intestate, leaving no wife, children, father, or mother, but leaving a sister, Catherine Clark, living in this state. The estate was administered, and during the administration Catherine Clark made a deed of conveyance of the estate to her daughter, Mary Rooney, the appellant. Upon final settlement of the estate, and upon proper notice as required by statute, the court found as a fact that Catherine Clark was the only heir and the property was distributed to appellant as the grantee of Catherine Clark.

After the said estate was settled, and the final decree of distribution so made, the children of one Patrick Lynch, a brother of deceased Bryan Lynch, who was living in Ireland at the date of said decree of distribution, but since deceased, brought an action for the purpose of having it adjudged and decreed that they were the owners of an undivided one-third of the land and that appellant held the land as trustees for them, and that the same should be partitioned. In the said last-named action the children of Nancy Plunkett, a deceased sister of said Bryan Lynch, intervened and asked that an undivided one-third of the land be adjudged to be theirs, and that Mary Rooney be adjudged a trustee and directed to convey the said one-third to them. Plaintiff, as one of the children of said Nancy Plunkett, deceased, was a party in intervention in said action. The relief prayed for in the complaint, by the heirs of Patrick Lynch, and in the complaint in intervention by the heirs of Nancy Plunkett, was granted, and it was adjudged that appellant Mary Rooney held one undivided one-third of the land as trustee of the heirs of Patrick Lynch, and one undivided one-third thereof as trustee of the heirs of Nancy Plunkett. From this decree an appeal was taken to this court—*Lynch v. Rooney*, 112 Cal. 282—and it was held, on appeal, that the decree of distribution in the estate of Bryan Lynch, deceased, was final as to the heirs of Nancy Plunkett, and the judgment was reversed as to the intervening children of Nancy Plunkett, deceased. In discussing the rights of said last-named intervenors the court, in its opinion said:

“It is substantially claimed that upon Mary Rooney’s evidence, given upon the hearing of the application for the decree of distribution, the court found as a fact that her mother was entitled to the whole estate as the only heir; that Mary Rooney was mistaken as to the fact of her mother being the only heir, inasmuch as there were other heirs, and that, by reason of her mistake of fact in so testifying, the court rendered a wrong judgment; and that Mary Rooney thereby gained the entire estate by a mistake of fact, and should be declared to be an involuntary trustee of two-thirds thereof, as provided by the terms of the section just quoted.

"It is insisted that the intervenors, in asking this relief, are not attacking the decree of distribution, but are seeking relief thereunder. Many cases are cited to support this contention, but they fall short of the mark and present no question similar to the one here involved. The court in hearing the petition for the distribution of the estate of Bryan Lynch, deceased, upon legal and proper notice to the entire world, took evidence as to where the heirs of his estate, entitled to take the same, and thereupon made a finding of fact that Catherine Clark was a sister and the only heir, and, as a conclusion of law, held that said Catherine Clark was entitled to the entire estate. That decree has never been modified, nor even assailed, and, as far as any collateral attack is concerned, it must stand forever as binding and conclusive upon the question of heirship. Whatever counsel may say as recognizing the validity of the decree, and claiming under it, is not strictly true, for that decree declares as a fact that Catherine Clark is the only heir of Bryan Lynch; and to give the intervenors the relief here sought that finding must be first set aside as untrue, and that cannot be done in this action. If such a thing could be done, the stability of judgments and decrees would be a thing of the past. Decrees of distribution would be as unstable as the sands, for omitted heirs from such decrees would be seeking to have involuntary trusts declared thereon at most inopportune times, and in direct opposition to the law as declared by section 1908 of the Code of Civil Procedure pertaining to the conclusiveness and finality of judgments and decrees."

The decision, therefore, is *res judicata* as to the rights of the plaintiff in this case as one of the heirs of Nancy Plunkett, deceased.

Upon the case being remanded to the court below on November 7, 1896, the action, as between the last-named intervenors and the appellant here, was again submitted upon the testimony introduced at the former trial, findings waived and judgment ordered December 23, 1896, that the intervenors, the children of Nancy Plunkett, deceased, take nothing by their complaint in intervention, and that appellant have judgment for her costs as to them. On January 22, 1897, an interlocutory decree in partition was accordingly entered, and

on September 25, 1897, a final decree was entered. This action was commenced by plaintiff, as one of the heirs of Nancy Plunkett, deceased, September 21, 1896. The appellant filed her amended answer September 25, 1897, and in said answer pleaded the judgment of January 22, 1897, in the former suit of *Lynch v. Rooney et al.*, as a bar to the action, and also pleaded that the action of *Lynch v. Rooney et al.* was still pending, and was and is prosecuted for the same cause of action, including the same parties and the same subject matter as the present action.

The court below found the facts in substances as herein stated, but undertook to differentiate the present case in some respects from the action in which the former final judgment had been entered, and held that the matter was not *res judicata*. In this we think the learned judge was in error. By the former decision of this court the decree of distribution in the estate of Bryan Lynch, deceased, was held final and conclusive as to the plaintiff here. Upon the cause being remanded, the court below followed the law as laid down by this court, and upon the same pleadings and evidence made its decree that the heirs of Nancy Plunkett (including plaintiff) were not entitled to any relief. The interlocutory decree was entered January 22, 1897, and was appealable. (Code Civ. Proc., sec. 963, subd. 2.) Unless appealed from within sixty days after entry it became final and conclusive of the rights of the parties to it. (Code Civ. Proc., sec 939, subd. 3; *Lorenz v. Jacobs*, 53 Cal. 24.) An interlocutory decree cannot be reviewed on appeal from a final judgment. (Code Civ. Proc., sec. 956; *Barry v. Barry*, 56 Cal. 10.)

The present action is similar in all respects to the former one in which the interlocutory and final judgments were entered. The parties in the present action were parties to the former, the property involved is the same, the cause of action—to wit, the right of plaintiff to a part of the estate of Bryan Lynch, deceased—is the same; and the plaintiff here is prosecuting this suit in her own right, as she did by her complaint in intervention in the former suit. In the opinion of the learned judge of the court below he said, in speaking of the bar of the former judgment: "The parties are the same, and the subject matter is the same; the only

question is as to the cause of action. The purpose and object of this action being the same as the other, so far as the recovery of an interest in the land is concerned, I am free to admit that I entertain grave doubts on the question as to whether or not the plea in abatement can be maintained, but the conclusion to which I have come is that this action, is not upon the same cause of action as the former action, and, therefore, the plaintiff is entitled to maintain it." The judge then gives as the principal reason why the cause of action is not the same that the former action was brought upon the theory that appellant held the real estate upon an implied or resulting trust, while in this case the theory is that appellant holds it by reason of an express trust as set forth in a letter written by her May 1, 1892, to the children of Nancy Plunkett, deceased. We do not think it the policy of the law to allow as many different suits between the same parties in regard to the same subject matter as there might be different modes of establishing title to property. The complaint in intervention in the former suit asked that it be decreed that plaintiff in this suit was the owner of an undivided interest in the real estate, and that appellant holds the said lands in trust, and that the court determine the rights of the parties and partition the same. The complaint in this case asks that it be decreed that plaintiff is the owner of an undivided interest in the same real estate, and that appellant holds the title in trust for her, and for general relief. In the complaint in intervention in the former case and in the complaint in the present case not a word is said as to whether or not the plaintiff here is proceeding upon the theory of an express trust or an implied trust. The facts stated are substantially the same, and the object sought precisely the same. The court below evidently thought that the letter of May 1, 1892, was sufficient to establish and charge appellant as trustee of the lands for the plaintiff as one of the heirs of Bryan Lynch. If so, it is unfortunate for plaintiff that the letter was not introduced in evidence in the former suit; but the plaintiff had her day in court, her case was tried upon the evidence she then had, and a final judgment reached. If a new action could be commenced and a case retried because of the discovery of new facts, after the case had been finally

disposed of, there would be no end of litigation, and a case could be kept in court forever. The law provides machinery for a full and fair hearing of all cases, giving the parties the right to fully present their case upon the merits, granting continuances for the purpose of taking depositions, or procuring the attendance of witnesses. After the case is tried, the losing party may apply to the court for a new trial upon the ground of newly discovered evidence, and if the evidence is material and due diligence and good faith are shown, the court is always ready to give relief. But to allow a party to commence another suit, after having once been defeated in the lower and in the appellate courts, for the reason that he has found different evidence, would be destructive of the very purposes for which courts are instituted. The rule as to *res judicata* is thus stated by Vice-Chancellor Wigran in *Henderson v. Henderson*, 3 Hare, 115, and approved by this court in *Woolverton v. Baker*, 98 Cal. 632: "The plea of *res judicata* applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

In *Aurora v. West*, 7 Wall. 84, 102, the rule is thus stated: "But where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed in *rem judicatam*, and the former judgment in such case is conclusive between the parties."

We fully appreciate the fact that if there had been no final decree of distribution in the estate of Bryan Lynch, deceased, and no further adjudication, the plaintiff's claim would be meritorious. But courts must follow general and well-established rules of law applicable to all cases and for the benefit of all. If plaintiff, through negligence in not properly presenting her case at the former trial, has lost her right to the property in controversy, it is a hardship, but one from which we have no power in this action to grant relief. To adopt any other rule than the one we have followed would open a "Pan-

dora's box" of evils that would upset the rules of property and the respect for final judgments of the courts.

The judgment is reversed and the cause remanded, with directions to the lower court to enter judgment for appellant upon the findings.

[Sac. No. 669. Department Two.—November 21, 1900.]

ANTON GERIG, Respondent, v. C. F. LOVELAND et al.,
Defendants. WILLIAM DOW, Appellant.

MORTGAGES TO SECURE SAME INDEBTEDNESS—FORECLOSURE—MISTAKE IN ASSIGNMENT—RELIEF IN EQUITY—SUBSEQUENT JUDGMENT CREDITOR.—Where two successive mortgages are given to secure the same indebtedness, the latter of which includes mortgaged property in addition to that included in the first mortgage, and subsequently the indebtedness is assigned by the mortgagee, but through mistake of fact as to the existence of the second mortgage the first mortgage alone is assigned, instead of the second, and is foreclosed, the assignee is entitled, upon a discovery of the mistake, and a showing that the mortgaged property included in the first mortgage is insufficient to pay the mortgage indebtedness and that the mortgagor is insolvent, to maintain a suit in equity to set aside the judgment of foreclosure, and for a foreclosure of the second mortgage, as against a judgment creditor of the mortgagor, whose judgment lien is subsequent to both mortgages, but prior to the first foreclosure, and who purchased at execution sale with full knowledge of the existence of the mortgage lien.

ID.—REMEDY BY MOTION—ERRONEOUS JUDGMENT—UNPREJUDICIAL ERROR.—In such a case, where the mistake is discovered after the expiration of six months after the decree of foreclosure in the first action is entered, the assignee is not limited to the remedy by motion under section 473 of the Code of Civil Procedure; and a judgment of foreclosure in the second action, without formally vacating the decree in the first action, although erroneous under section 726 of the Code of Civil Procedure, is without prejudice to such judgment creditor and is not a reason for a reversal on his appeal.

APPEAL from a judgment of the Superior Court of Lassen County. F. A. Kelley, Judge.

The facts are stated in the opinion of the court.

Spencer & Raker, and H. D. & G. S. Burroughs, for Appellant.

Goodwin & Goodwin, for Respondent.

TEMPLE, J.—This is an action to obtain the cancellation of a decree of foreclosure of a mortgage, alleged to have been had through the mistake of plaintiff, and to obtain a decree foreclosing another mortgage given to secure the same indebtedness. Plaintiff had judgment, and the defendant Dow appeals from the judgment upon the judgment-roll.

In December, 1890, defendant Loveland executed a mortgage to one L. C. Stiles to secure an indebtedness, evidenced by a promissory note due two years after date, and bearing interest.

On the thirtieth day of November, 1892, Loveland executed another mortgage to said Stiles to secure the same indebtedness. This mortgage covered all the property covered by the first mortgage and two hundred acres of land which were not included in the first mortgage. Subsequently, the note was purchased by plaintiff, and a formal assignment of the first mortgage was made to plaintiff and was by him duly recorded. It is alleged that the intention was to assign the second mortgage, and not the first, and that the mistake was made by the attorney, who did not know of the second mortgage, and that, through a similar error, an action to foreclose was brought by plaintiff upon the first mortgage only. A decree was entered in due form foreclosing said mortgage before plaintiff discovered the mistake. It is averred that the property described in the first mortgage is not of sufficient value to secure the debt due plaintiff. The decree in the first action was entered January 20, 1896; plaintiff discovered the mistake August 11, 1896; this action was commenced December 9, 1896.

Appellant was made a party defendant, and it was alleged that he claimed some interest in, or lien upon, the mortgaged premises, which was subsequent and subject to the lien of the mortgage.

The defendant Dow demurred and answered, pleading in both demurrer and answer the statute of limitations. He also sets up an estoppel against plaintiff's right to proceed with the second foreclosure.

Appellant obtained a money judgment against Loveland, which was duly docketed, and became a lien upon the mortgaged premises, subsequent to both mortgages but prior to the first foreclosure. After the entry of the decree in the first action to foreclose, appellant, as he avers, finding that plaintiff had abandoned his claim under the second mortgage and had foreclosed upon a part of his security only, caused an execution to be levied upon two hundred acres of land, upon which a foreclosure was not sought, and a sale thereof to be made, and became the purchaser thereof for the sum of five hundred dollars, which was thereupon credited upon his judgment against Loveland. If plaintiff is now allowed to foreclose upon the two hundred acres, appellant will lose this sum besides costs. Loveland has become insolvent.

The first point made by appellant is that plaintiff can have but one action to foreclose his mortgage, and if he proceeds to foreclose by piecemeal the first decree foreclosing upon a portion of the security will bar all further proceedings to foreclose the same mortgage. It has been so held under section 726 of the Code of Civil Procedure. (*Mascarel v. Raffour*, 51 Cal. 242.) This is an obstruction which plaintiff is endeavoring to remove by the judgment in this case. Whether he can obtain that relief depends upon general principles of equity, and is not affected by section 726 of the Code of Civil Procedure. The obstruction once removed, the objection will not hold.

It is next contended that plaintiff should have proceeded under the provisions of section 473 of the Code of Civil Procedure. Not having done so within six months, his right to relief is barred. The case of *Brackett v. Banegas*, 116 Cal. 278, answers this contention.

The next point made is that plaintiff, by his gross negligence, has induced appellant to incur expense and satisfy a portion of his judgment, and to place himself in a position where he will suffer irreparable injury, if plaintiff can now have his own gross negligence considered such a mistake as will entitle him to the equitable relief sought.

An equitable estoppel is only enforced in the interests of justice. The evidence is not brought up on this appeal. If it had been, it may have appeared that appellant's claim to

an estoppel is grossly unjust. Perhaps, when he purchased at his own execution sale, he knew that the first foreclosure was a mistake and that the present action was contemplated. He may have proceeded against the protest of plaintiff, and in haste, hoping to preclude the relief here sought. It is not necessary, therefore, to determine what the law would be upon the facts alleged in the answer. The finding upon this point is brief and to the effect that appellant purchased with full knowledge of the existence of the mortgage lien, and will sustain no damage by the foreclosure.

It is not charged that plaintiff made any representations, or that he waived his lien upon the two hundred acres in controversy otherwise than by his mistake in the first suit. If, as found, the security without the two hundred acres was insufficient, and Loveland was insolvent, these facts were suggestive that the first attempt to foreclose was a mistake. That plaintiff might attempt to retrieve his error was to have been expected, and when appellant procured the land to be levied upon it was not too late to do so. The supposed equity of appellant, under the circumstances does not commend itself to us. (See upon this point *Hines v. Ward*, 121 Cal. 115.)

The last point is that by the decree the court did not vacate the previous decree, but simply proceeded to foreclose the second mortgage, so that there are now two decrees in two different actions for the collection of the same debt, in violation of section 726 of the Code of Civil Procedure. This is obvious error, but appellant is not injured thereby.

The judgment is affirmed.

Henshaw, J., and McFarland, J., concurred.

[S. F. No. 1727. Department One.—November 22, 1900.]

CHARLES ASHTON et al., Executors, etc., Respondents,
v. C. J. HEGGERTY et al., Appellants.

REVERSAL OF DECREE OF DISTRIBUTION—RESTITUTION TO EXECUTORS—ASSIGNED PART OF ESTATE.—Upon the reversal of a decree of distribution of the estate of a deceased person, the executors are entitled to restitution of the whole estate, including any part thereof which has been assigned or transferred by the distributee.

ID.—ASSIGNED PROPERTY NOT SUBJECT TO MORTGAGE.—In an action to obtain the restitution of property of the estate which was assigned by the distributee, it is no defense that the assigned property was not subject to an outstanding mortgage, owing to the existence of which the decree of distribution was reversed.

ID.—CONSIDERATION FOR ASSIGNMENT—PURCHASER NOT PROTECTED—PRESUMPTION.—It is immaterial whether there was or was not a consideration for the assignment made by the distributee. The purchaser could only acquire the title of the distributee, and must be presumed to know the nature of the title purchased as shown by the records.

ID.—PLEA IN ABATEMENT—PRIOR ACTION PENDING FOR RESTITUTION OF STOCK—SECOND ACTION AGAINST CORPORATION AND TRANSFEREES.—A prior action pending for the restitution of stock to the executors brought against a distributee and assignee of the shares, is not for the same cause of action, nor against the same parties, as a second action by the executors against the corporation and two transferees of the stock upon its books, who took the transfer, pending an appeal in the prior action, to cancel the certificates and to compel issuance of certificates of stock to the executors. The pendency of such prior action cannot be successfully pleaded in abatement of the second action.

ID.—CAUSE OF ACTION AGAINST CORPORATION—CANCELLATION OF CERTIFICATES WRONGFULLY ISSUED—KNOWLEDGE OF STAY BOND—NECESSARY PARTIES.—The executors had a cause of action against the corporation to cancel the certificates of stock, where it appears that they were wrongfully issued in violation of the rights of the executors pending their appeal in the prior action, with knowledge by the corporation that they had given a stay bond upon the appeal. To such cause of action the transferees of the stock were necessary parties codefendant.

ID.—CAUSE OF ACTION FOR TRANSFER OF STOCK—OWNERSHIP.—The executors had also an independent cause of action against the corporation and the transferees of the stock owned by the estate, by reason of such ownership thereof, to compel a transfer of the stock to their names as executors.

JD.—EQUITABLE ACTION—TRIAL BY JURY.—The action to cancel the shares of stock and to compel their transfer from the corporation to the executors, however regarded, is an equitable action, in which it is not error to refuse a demand of trial by jury.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Knight & Heggerty, and George D. Collins, for Appellants.

The decree of distribution was reversed by reason of the mortgage on the unproductive property (*In re Heydenfeldt*, 117 Cal. 552, 555), and its reversal ought not to affect the title of the distributee or her assignee to property not subject to the mortgage. (Code Civ. Proc., sec. 957.) S. O. Heydenfeldt was a purchaser of the stock for value, who should be protected. (*Langley v. Warner*, 3 N. Y. 327; *Reynolds v. Harris*, 14 Cal. 681.¹) The corporation was not affected by the *supersedeas*, and the reversal did not avoid that which was valid when done. (*Bank of United States v. Bank of Washington*, 6 Pet. 8.) The corporation was bound to transfer the stock upon demand to the distributee and to her transferee. (*Langley v. Warner*, *supra*; 1 Cook on Corporations, secs. 330, 373, 402; *Bond v. Mount Hope Iron Co.*, 99 Mass. 505²; Lowell on Transfer of Stocks, secs. 135, 138; *Smith v. Nashville etc. Ry. Co.*, 91 Tenn. 221.) Unless the appeal operated as an injunction against the corporation issuing and registering the new certificate to Elizabeth A. Heydenfeldt, we submit it was the legal duty of the corporation to do the very thing that respondents complain of as being fraudulent, and had it refused, Mrs. Heydenfeldt could have compelled the specific performance of the duty (1 Cook on Corporations, secs. 384, 391), or recovered damages. (*Crocker v. Old Colony R. R. Co.*, 137 Mass. 417, 419; Lowell on Transfer of Stock, sec. 135.) There is no cause of action against the corporation. The proceeding to reach the stock only lies against the holders of the stock. (*Mechanics' Bank v. Seton*,

¹ 76 Am. Dec. 450.

² 97 Am. Dec. 49.

1 Pet. 299; *Cowles v. Whitman*, 10 Conn. 121.³) The court erred in denying a jury trial. (Code Civ. Proc., sec. 592.) The pendency of the former action is a ground for abatement of this action. (*Brown v. Campbell*, 110 Cal. 650.)

Evans & Meredith, and Lester H. Jacobs, for Respondents.

The executors have the right to the possession of the assets of an estate in probate until distribution, and have a special property in such assets for the purpose of administration. (Code Civ. Proc., secs. 1452, 1581; *Page v. Tucker*, 54 Cal. 121; *Horton v. Jack* (Cal., Sept. 4, 1894), 37 Pac. Rep. 652; *Horton v. Jack*, 115 Cal. 29.) An assignee of a litigant who acquired property under a judgment or decree which was subsequently reversed has no better title than his assignor, whether he has paid a consideration for the property or not. (*Marks v. Cowles*, 61 Ala. 299; *Debell v. Foxworthy*, 9 B. Mon. 228; *Harle v. Langdon*, 60 Tex. 555, 562; *Earle v. Couch* 3 Met. (Ky.) 450; *Clary v. Marshall*, 4 Dana. 95; *Twogood v. Franklin*, 27 Iowa, 239; *Sayre v. Elyton Land Co.*, 73 Ala. 85, 104; *Phillips v. Benson*, 82 Ala. 500, 503; *Miller v. Hall*, 1 Bush. 229; *Clark v. Farrow*, 10 B. Mon. 446⁴; *Madeira v. Hopkins*, 12 B. Mon. 595, 601.) An action to compel a corporation to issue stock certificates is properly a suit in equity. (*Treasurer v. Commercial Coal Mfg. Co.*, 23 Cal. 390; 1 Cook on Corporations, 4th ed., sec. 391; *Ralston v. Bank of California*, 112 Cal. 208; *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Iron R. R. Co. v. Fink*, 41 Ohio St. 321⁵; *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365⁶; *Wilson v. Atlantic etc R. Co.*, 2 Fed. Rep. 459.) In order that the pendency of one action should be ground for the abatement of another, the causes of action must be the same. (*Ayres v. Bensley*, 32 Cal. 620; *Martin v. Splivalo*, 69 Cal. 611, 615; *Kelsey v. Ward*, 16 Abb. Pr. 98; *Wise v. Prowse*, 9 Price, 393; *Wilson v. St. Paul etc. Ry Co.*, 44 Minn. 445; *Mathews v. Hennepin Co. Sav. Bank*, 44 Minn. 442.) Where the relief sought in the second action is not obtainable in the first, there is no abatement. (*Reynolds v. Harris*, 9 Cal. 338; *Bolton v. Lan-*

³ 25 Am. Dec. 60.

⁴ 52 Am. Dec. 552.

⁵ 52 Am. Rep. 84.

⁶ 32 Am. Rep. 315.

ders, 27 Cal. 104; *Coles v. Yorks*, 31 Minn. 215; *Ward v. Curtiss*, 18 Conn. 290, 294; Story's Equity Pleading, sec. 739.)

VAN DYKE, J.—The facts of the case are substantially the same as those involved in *Ashton v. Heydenfeldt*, 124 Cal. 14. That was a suit brought for the recovery of certain shares of stock in the Zeila Mining Company, the property of the estate of Solomon Heydenfeldt, plaintiffs' testator, which had been distributed, under a decree afterward reversed, to the defendant Elizabeth, and by her assigned—it was alleged, without consideration—to the other defendant. These facts, with necessary formal allegations, constituted the case made in the complaint, to which a demurrer was sustained; and on appeal the judgment was reversed, and the complaint held sufficient.

This suit was brought, pending the appeal in that case, against the defendant Sunshine O. Heydenfeldt and the defendant Heggerty—to whom she had assigned one share of the stock—and the defendant corporation, to determine the interests of all the parties in the same stock; and also to have the proper certificates issued to the plaintiffs and the outstanding certificates canceled. In this suit the same facts were alleged—with others—as in the former. The answer, besides denials, avers that the decree of distribution referred to was reversed on the ground that there was an outstanding mortgage indebtedness of forty thousand dollars constituting “a charge upon the unproductive property of said estate”; and it was so found. The pendency of the former action was also pleaded in abatement, and its effect found. Otherwise the findings were in favor of the plaintiffs, in whose favor judgment was also rendered. The appeal is from an order denying defendants' motion for a new trial; and the grounds urged for a reversal are that the court refused the defendants' demand for a jury; that the plea in abatement of the action should have been sustained; that the defendant Heydenfeldt was a *bona fide* purchaser without notice; and, finally, that the decree of distribution was reversed by this court on the ground that the outstanding mortgage was a charge on the unproductive property of the estate only, and consequently the reversal did not affect the property in question, which was productive.

1. On the last point it may be assumed that the property in question was in fact productive, and consequently not liable for the outstanding mortgage, at least until the unproductive property was exhausted in the payment of debts. The fact is, however, immaterial. The grounds on which the decree was reversed will doubtless constitute the law of the case for the lower court in its further proceedings, but they did not affect the nature of the judgment of this court, which was an unqualified reversal of the decree. On this point we must hold, as was held in the former case, that the "decree having been reversed, the matter stood as though no decree had ever been made," and that the plaintiffs, unless there are other errors, "are entitled to restitution."

2. Nor is it material whether the assignment to the defendant Heydenfeldt was without consideration, as found by the court, or otherwise, as claimed by appellant. The case presented is not the case of a purchaser under execution, but of an ordinary purchaser, who necessarily acquires only the title of his vendor, and who, if notice be material, must be presumed to know the nature of the title purchased as shown by the records.

3. The finding of the court on the plea in abatement was fully justified by the evidence; nor was there any error in overruling the plea. The present action is not between the same parties as the former, nor is the cause of action the same. (Code Civ. Proc., sec. 439, subd. 3, sec. 433.) The defendant Heggerty and the corporation defendant are new parties, and the causes of action against them are new.

With regard to the latter defendant it is claimed that there was no cause of action against it in favor of the plaintiffs, and that the demurrer should have been sustained. But if the question can be considered on this appeal, which we do not hold, we do not consider the objection tenable. The issue of certificates to Mrs. Heydenfeldt, and subsequently to her daughter, the defendant, took place after the taking of the appeal, on which a stay bond had been given, and of which the defendant corporation had notice. The issue of the certificates was therefore in violation of the rights of the plaintiffs, and gave them a right of action for the cancellation of the certificates and the retransfer of the stock to them (Morawetz

on Corporations, sec. 181 et seq.), to which action the other defendants were necessary parties. (Code Civ. Proc., sec. 389.) But, independently of this special cause of action against the defendant corporation, the mere fact of the plaintiff's ownership was sufficient to give them a cause of action against it for a transfer of the stock. That this is the case where stock has been assigned is well settled. (Morawetz on Corporations, sec. 218; *Treasurer v. Commercial Min. Co.*, 23 Cal. 390; *Ralston v. Bank of California*, 112 Cal. 213); and the same principle will apply to all cases where one acquires the equitable title to stock standing in the name of another. (Morawetz on Corporations, secs. 219-21; *Treasurer v. Commercial Min. Co.*, *supra*, and authorities cited.)

4. The action, however regarded, is an equitable action. (Authorities cited *supra*; *Ashton etc. v. Heydenfeldt*, *supra*.) There was, therefore, no error in denying the appellants' demand for a jury. (Code Civ. Proc., Deering's ed., sec. 592, note.)

The order appealed from is affirmed.

Harrison, J., and Garoutte, J., concurred.

[S. F. No. 1647. Department One.—November 23, 1900.]

MARY WALES, Respondent, v. PACIFIC ELECTRIC
MOTOR COMPANY, Appellant.

ACTION FOR DEATH—ELECTRIC WIRE NOT PROPERLY INSULATED—VIOLATION OF ORDINANCE—CHANGE OF POSITION OF WIRE.—In an action for death caused by an improperly insulated electric wire maintained in violation of a city ordinance, the right of recovery is not precluded by the mere fact that the original position of the wire may have been subsequently changed by some extrinsic cause.

ID.—MEASURE OF DAMAGES—PECUNIARY LOSS—LOSS OF SOCIETY—ERRONEOUS INSTRUCTION.—In an action by a mother for the death of her son, the measure of damages is the pecuniary loss to the mother; and though the jury may be allowed to consider the loss suffered in being deprived of the comfort, society, and protection

of the son, they can only be considered for the purpose of fixing the pecuniary loss. It is reversible error to instruct the jury that, in addition to the pecuniary loss, damages may be awarded in compensation for the loss of society.

1D.—EXCEPTION TO PARTS OF CHARGE.—An exception embodying certain portions of the charge of the court, and stating that "the action of the court in giving said portions of said charge was contrary to law," is sufficiently specific to raise a question of law presented by a particular portion of the charge so excepted to.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

John Flournoy, for Appellant.

Sullivan & Sullivan, for Respondent.

GAROUTTE, J.—This is an appeal from a judgment in favor of Mary Wales, based upon the death of her son, alleged to have been killed by coming in contact with a live electric wire, which was improperly insulated and maintained by defendant in violation of an ordinance of the city of San Francisco. Deceased was engaged in painting a building at the time, and, while changing the position of the wire by taking hold of it, he received a shock which precipitated him to the street below and caused his death. The facts are ample to support the verdict, and it is unfortunate that the giving of certain instructions to the jury constitutes error which demands a retrial of the case.

The electric wires were situated upon the cornice of the building and fastened thereon by wooden brackets. It is in evidence that one of these brackets had been broken off from its position by the foreman of the painters a short time prior to the accident, which act probably changed, to a very limited extent, the location of the wire which subsequently caused the death of the deceased. In view of the evidence upon this point, the defendant requested, and the court gave, the following instruction to the jury: "That before plaintiff can recover in this action you must be satisfied that her decedent, without contributory negligence on his part, received his injuries by coming in contact with a wire in the position in which it was maintained by the defendant; and if you find

that he received his injuries by coming in contact with a wire which had been broken from the insulator, and not in the position in which it was maintained by the defendant, then our verdict should be for defendant." By reason of our conclusion as to the unsoundness of another instruction we will not analyze the foregoing proposition of law in detail. If it be intended by the language used to declare that a mere change in the position of the wire by some extraneous element, after it was originally placed upon the building by defendant, in violation of a city ordinance, acquitted it of negligence in this case, then the instruction is radically wrong. Defendant placed the wire upon the building and used it there, and the mere fact that the location of the wire may have been subsequently changed by some extrinsic cause, of itself, in no way defeats plaintiff's right of recovery. Defendant maintained the wires upon the building in violation of the ordinance, and would be equally guilty regardless of any change in their position. As already suggested, it becomes unnecessary to decide whether or not the jury disobeyed this instruction in finding a verdict for the plaintiff.

In enlightening the jury as to the measure of damages the court said: "That is to say, you are to ascertain here what amount, if any, this party contributed to the care and support of the plaintiff here, his mother; not the amount which he earned, as counsel properly stated, but the amount which he contributed to her support and care. And in estimating that amount, as previously stated, you may take into consideration his health, physical ability to labor, and his habits. And in addition to that the law has also said that you may award damages in compensation for the loss of his society." We have been cited to no case where the law says "damages may be awarded for the loss of society." As we read and understand the law, it says directly to the contrary. It is essentially and alone pecuniary loss to the parent which he may recover in damages for the death of his child. In *Pepper v. Southern Pac. Co.*, 105 Cal. 401, the following instruction was declared erroneous: "That the measure of damages is not alone the pecuniary loss and injury sustained by the plaintiff in the loss of his son, as just explained, but in assessing the damages, you may in addition take into considera-

tion the loss, if any, sustained by plaintiff in being deprived of the comfort, society, and protection of the deceased by reason of his death." In *Lange v. Schoettler*, 115 Cal. 391, it is said: "It is true in the case of a mother or a wife the jury have been allowed to consider the fact that they were deprived of the comfort, society, and protection of a son or husband, but it has always been held that this was in strict accordance with the rule that only the pecuniary value of the life to the relatives could be recovered." In *Harrison v. Sutter Street Ry. Co.*, 116 Cal. 156, we find this language: "While the jury have the right in such a case to consider the loss suffered by the widow in being deprived of the comfort, society, and protection of her husband, they can regard these things only for the purpose of fixing the pecuniary value of his life. The instruction here was calculated to lead the jury into the error of supposing that they could on this account add something more than pecuniary loss." It may well be said in this case that the instruction was calculated to lead the jury in fixing the amount of the verdict to add something more than pecuniary loss. (See, also *Green v. Southern Pac. Co.*, 122 Cal. 563; *Morgan v. Southern Pac. Co.*, 95 Cal. 510.¹) When a jury is told that in making up a verdict it may award damages in compensation for the loss of the society of the deceased, it can only mean what the language so plainly imports, and that is, damages may be awarded for the mere loss of society regardless of any actual pecuniary loss.

The instruction to which our attention has just been directed is found in the general charge of the court to the jury, and the point is now made by the respondent that the exception to it is too weak to serve the purpose of a valid exception. It is declared to be too general. The exception is in the following words: "Be it also remembered that defendant duly excepted and now excepts to the following portions of the charge given to the jury by the court on its own motion, and insists that the action of the court in giving said portions of said charge was contrary to law." Then follows that portion of the charge which includes the part which we have

¹ 29 Am. St. Rep. 143.

just been considering. Under the authority of *Bernstein v. Downs*, 112 Cal. 205, we hold the exception sufficiently broad to raise the question here discussed. By the portion of the charge to which the exception was directed the court declared to the jury the measure of damages which should control them in arriving at their verdict. It related solely to the measure of damages and constituted a separate and distinct branch of the charge. We deem an exception thereto sufficiently specific. The fact that one of the elements of damage going to make up the measure was stated correctly does not change the rule of law. All the elements together constituted the measure furnished to the jury, and if one element of damage was wrongly stated, the measure was a defective one, and an exception to it as a whole was sufficient.

For the foregoing reasons the judgment is reversed and the cause remanded for a new trial.

Harrison, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion on the 24th of December, 1900:

BEATTY, C. J.—I dissent from the order denying a rehearing because in my opinion the decision in Department overrules, without mentioning it, the case of *Beeson v. Green Mountain Co.*, 57 Cal. 20. If the doctrine of that case is to be wholly set aside, I think it should be done by the court in Bank plainly and unequivocally, so that hereafter the superior courts may have some certain guide in giving instructions as to the elements of damage in cases of this character. In the *Beeson* case it was held that in estimating the pecuniary damages to the plaintiff the jury could consider two elements—loss of support and loss of society—and an instruction of the trial court to that effect was sustained. In this case the instruction for the giving of which the judgment is reversed states the same identical proposition, and nothing more. In this respect it differs in the same way and to the same extent that the *Beeson* case differs from the cases cited as authority in the opinion of the court. In every one

of those cases it was held, and with some reason, that the instruction complained of told the jury that in addition to the pecuniary damage to plaintiff they could award damages for loss of society. The charge here does not bear such a construction. It merely tells the jury what the two elements of damage in such cases are.

As to the Beeson case, it may or may not lay down the correct doctrine. Certain it is, however, that it has never been overruled by this court. On the contrary, it has been repeatedly cited and followed, and where it has not been followed the court has been at pains to point out the distinction above mentioned, viz., that the instruction condemned allowed damages for loss of society in addition to all pecuniary damage.

I think the doctrine of the court on this point ought to be made clear.

[S. F. No. 1630. Department One.—November 23, 1900.]

JOHN O'BRIEN, Respondent, v. FRANK PERRY et ux.,
Defendants. ANNIE PERRY, Appellant.

CONTRACT FOR LIFE TENANCY—PERSONAL SERVICES—SPECIFIC PERFORMANCE—REMEDY AT LAW.—An oral agreement between a father and daughter that he would give her and her family the rent of his home free for life, and would leave her by will the residue of his estate, subject to certain bequests, in consideration of her promise to provide him a home therein and supply his personal wants for life, is a contract on her part to render personal services during the life of her father, and cannot be specifically enforced by either party. For any breach of the contract while unperformed on her part, the parties must be left to their remedy at law.

ID.—BREACH OF CONTRACT—TENANCY AT WILL—NOTICE TO QUIT—UNLAWFUL DETAINER—INJUNCTION.—Upon breach of the contract by the father, in refusing to remain to be provided for, and treating the occupation of his house by the daughter and her family thereafter as a tenancy at will, and, after giving them notice to quit, bringing an action of unlawful detainer against them, the daughter, not being entitled to a specific performance of the contract, cannot defend such action as a life tenant, and is not entitled to an injunction to restrain interference of the father with her occupation of the premises.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George H. Bahrs, Judge.

The facts are stated in the opinion of the court.

William M. Cannon, and T. C. Coogan, for Appellant.

Sullivan & Sullivan, for Respondent.

THE COURT.—Unlawful detainer. Plaintiff had judgment, from which defendant Annie Perry appeals on the judgment-roll. Plaintiff's complaint proceeds upon the theory that defendants occupy the premises in question—a flat, No. 126½ Noe street, San Francisco—as tenants at will of plaintiff.

Defendants pleaded occupancy of the premises under an oral contract with plaintiff by which defendants were to live in the flat, there furnish him a home, care for his personal wants, in consideration of which plaintiff was to make a will in appellant's favor and permit her and her family to remain in said flat during plaintiff's life.

Plaintiff had made a conditional conveyance of certain of his real property to two of his daughters, other than defendant Annie, but owing to some disagreement in relation thereto the deeds were recalled and a settlement made of the controversy. The findings as to this and some other matters do not aid materially in deciding the case and need not be particularly referred to. As to the agreement under which appellant claims the court found as follows: "During the month of May, 1895, and while said settlement was in progress [referring to the settlement of the controversy with his other two daughters], said plaintiff proposed to defendant Annie Perry, who was then living with her husband and family of three children upon premises owned by her and her husband on Eureka street, in the city and county of San Francisco, that if she would give up her said residence and go with her said husband and family to live in said flat belonging to him at No. 126½ Noe street, and if she would there furnish him with a home for and during the remainder of his life with her and her family, and provide for his personal wants, he, the plaintiff, in consideration thereof, would give and grant to her the right to live with her said family in said flat, No. 126½ Noe street, during his, the plaintiff's

lifetime, free and clear of any rent or other charge, and that he would thereupon make and publish a will, in and by which he would devise and bequeath to her all of his property not deeded to his daughters Sarah and Lizzie, subject to the payment of a bequest to his daughter Mary Bergener of two thousand (\$2,000) dollars, and a bequest to his son, Joseph Damien O'Brien, of one thousand (\$1,000) dollars, and a bequest to his nephew, David O'Brien, of five hundred (\$500) dollars, and subject also to the payment of expenses of administration, and the payment to his executors of one thousand (\$1,000) dollars for the purpose of reinterring the remains of deceased members of his family, should such reinterment be necessary, and for the payment of masses for the repose of their souls. Said defendant, Annie Perry, then and there, by and with the consent of her husband, accepted each and all of said proposals on the part of plaintiff, and agreed to perform all of them."

The court found that upon leaving her home on Eureka street appellant sold certain of her household goods, "losing by said sale about sixty dollars upon the original cost of such articles, and that she paid out the expenses of removal from Eureka street to Noe street"; the court also found that about July 21, 1896 (something over a year after appellant moved to plaintiff's house), plaintiff left the premises 126½ Noe street without the knowledge or consent of defendants; he "had been sick, and had become dissatisfied with his condition and his treatment by defendants, and on the date mentioned went to live with his daughters Lizzie Tierney and Sarah O'Brien, where he has since resided," and has ever since claimed that defendant Annie had no interest in the Noe street property; the flat No. 126½ "had been furnished by plaintiff, and occupied by him as his house prior to the removal of defendants from Eureka street." During the time plaintiff and defendants resided together at 126½ Noe street "he from time to time contributed from his own means toward the support of defendant Annie Perry"; during their occupancy defendants paid no rent "or any of the charges accruing against said property"; during all said time defendant Annie "has been ready and willing, and still stands ready and willing, to furnish plaintiff a home, and to render him her personal services and attentions, as in the proposals of

plaintiff hereinabove mentioned and as in these findings recited and set forth."

Defendants do not ask specific performance of the contract, although it is claimed that the contract is sufficiently certain for specific performance, but, as is said in their brief, they ask "only preventive remedies until the time for specific relief is ripe." It is prayed that it be decreed that defendant Annie Perry owns an interest in said flat, determinable only at the death of plaintiff, with the right to reside there during plaintiff's life without paying rent, and that plaintiff be compelled to execute a conveyance of such interest; that the said will be declared irrevocable as against defendant Annie Perry, and that plaintiff be adjudged to have no power to alienate or encumber said property to said defendant's prejudice, and that plaintiff be restrained from interfering in any manner with said defendant's said rights.

Although defendants do not at this time, for obvious reasons, claim full relief under the alleged contract, it is quite clear that the relief now asked cannot be given them unless, from the facts shown, they would ultimately be entitled to what they claim are their full rights.

Respondent contends that no contract is proven, and certainly not such a contract as is capable of specific enforcement. "An obligation to render personal service cannot be specifically enforced." (Civ. Code, sec. 3390, subd. 1.)

There are some exceptions to this rule, but we do not think this case is one of them. In the very nature of the services undertaken by appellant, which are prospective and may be continued for years, it would be utterly impracticable for the court to compel performance on her part, and without this could be done there would be no mutuality of remedy which is essential to authorize the specific performance of a contract. If plaintiff could not compel appellant to live in his house and minister to his personal wants during his natural life, the rule is that she cannot compel performance on his part; the parties in such case will be left to their remedy at law.

The doctrine was quite fully discussed in the early case of *Cooper v. Pena*, 21 Cal. 404, and this case has been frequently cited, and the rule there laid down has been approved in

many cases. In *Thurber v. Meves*, 119 Cal. 35, it was said: "While an obligation to perform personal services is one of which specific enforcement may not be had (Civ. Code, sec. 3390), this rule has not the effect to defeat the right to have the specific benefit of an enforceable obligation entered into in consideration of personal services, where such services have been fully or substantially performed." (See, upon the point, Pomeroy's *Specific Performance of Contracts*, sec. 162 et seq; see, also, sec. 310 et seq.) But it cannot be said in the present case that the services were substantially, and they certainly were not fully, performed by appellant. Plaintiff may live many years; he may outlive appellant.

It was said in *Duvall v. Myers*, 2 Md. Ch. 401, that the right to specific performance depends upon whether the agreement itself is obligatory upon both parties, "so that upon the application of either against the other, the court would coerce a specific performance. . . . His right to the aid of the court does not depend upon his subsequent offer to perform the contract on his part, but upon its original obligatory character." (See *Grimmer v. Carlton*, 93 Cal. 189; *King v. Gildersleeve*, 79 Cal. 504.¹ See, also, the recent case, *Stanton v. Singleton*, 126 Cal. 657.)

Appellant was not materially injured by the exchange of homes, and her promise involved her in no new pecuniary liability. In fact, her situation was improved in some respects, for she had a home free of cost to her and could collect rent on the home she left. Apart from these considerations, which bear only upon the question of substantial performance by appellant, we do not think she could be compelled to perform her agreement, and therefore she cannot have the relief asked.

The matters alleged in the answer upon which it is claimed the court failed to make findings do not seem to affect the question, nor would they change the result even if found in appellant's favor. Respondent raises several important considerations as bearing upon the validity of the alleged contract. The view we have taken makes it unnecessary to pass upon them.

The judgment is affirmed.

¹ 27 Am. St. Rep. 171.

[S. F. No. 1905. Department One.—November 23, 1900.]

T. F. A. OBERMEYER, Respondent, v. WILLIAM PATTERSON, Appellant.

STREET ASSESSMENT—EVIDENCE—CERTIFICATE OF CITY ENGINEER.—In an action to foreclose the lien of a street assessment, a certificate of the city engineer stating that a record in his office of another certificate shows that the work of grading specified “was examined and found to be practically right for official line and grade,” should be excluded from evidence, and, if admitted, is insufficient to sustain the plaintiff’s case.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion.

Alex. G. Eells, and H. K. Eells, for Appellant.

J. C. Bates, for Respondent.

GRAY, C.—Action to foreclose a lien for street work. Plaintiff had judgment, from which and from an order denying him a new trial defendant Patterson appeals.

At the trial of the case plaintiff offered in evidence the certificate of the city engineer, which reads as follows:

“No. 1722. San Francisco, March 31, 1896.

“I hereby certify that a record in this office of certificate No. 597, date June 16, 1894, shows that the work of grading of Eighth avenue south between M and N streets south, was examined and found to be practically right for official line and grade.

“13,174 cubic yards cut.

320 cubic yards fill.

“13,494 total.

“C. S. TILTON,
“City Engineer.”

This certificate was objected to by defendant on the following grounds: "That said certificate is not such a certificate as the statute requires, in that it does not certify to any facts whatever, but certifies to a record of a former certificate which is not set forth in it, nor is said record offered in evidence in any manner; that said certificate does not show by whom said work was examined, nor by whom it was found to be practically correct, and is not the best evidence of what said record, referred to therein, shows; that said certificate does not show that said Tilton, or any other city engineer, nor any authorized deputy, ever examined said work, or ever ascertained or found or verified any of the facts referred to therein."

The above objection, for the reasons therein stated, should have been sustained by the trial court. (*Frenna v. Sunnyside Land Co.*, 124 Cal. 437, and cases therein cited.) This being the certificate, presumably, that was referred to in the complaint as having been recorded with the assessment, warrant, and diagram, and being clearly insufficient, the motion for a nonsuit made by defendant at the conclusion of plaintiff's evidence should have been granted. There is nothing in *Hornung v. McCarthy*, 126 Cal. 17, in conflict with the opinion herein.

It is unnecessary to consider the other points made on this appeal, for the reason that this defective certificate will defeat any recovery in this action by plaintiff, whatever might be decided as to said other points.

We advise that the judgment and order appealed from be reversed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

Van Dyke, J., Harrison, J., Garoutte, J.

Hearing in Bank denied.

[S. F. No. 2182. Department Two.—November 24, 1900.]

SARAH LOUISA NICHOLSON, Administratrix, etc., Respondent, v. RANDALL BANKING COMPANY, Appellant.

ACTION AGAINST BANK—EVIDENCE—PASS-BOOK—HARMLESS RULING.—

In an action against a banking company to recover the balance of an account of money deposited, where the genuineness of the pass-book relied upon was fully established by competent evidence, and it was properly admitted in evidence, the admission of testimony relative to its genuineness, objected to as not the best evidence thereof, is harmless, even if erroneous.

ID.—EVIDENCE OF ATTORNEY—GENUINENESS OF PASS-BOOK SHOWN BY CLIENT.—An attorney may testify to the genuineness of a pass-book in the possession of his client, which was exhibited to him by the client, and which the attorney personally knew to be in the handwriting of the cashier of the banking company defendant. Such evidence is not in reference to any privileged communication between the attorney and client, though he advised him with reference to the account.

ID.—AUTHORITY OF CASHIER—ACQUIESCENCE OF BANKING COMPANY.—Where the banking company defendant, by a long course of acquiescence in the acts of the cashier, has held him out as having authority to do those acts, it cannot afterward repudiate them; and it is immaterial whether he had or had not power to do them merely by virtue of his position as cashier.

ID.—TRANSFER OF DEPOSIT ACCOUNTS FROM FORMER BANK—ACTION OF CASHIER—ESTOPPEL OF BANKING COMPANY.—Where the business of a former bank kept by the president of the banking company was turned over to it, as successor thereof, and the former bank ceased to do business, and the cashier of the latter issued its own pass-books to the depositors in the former bank, for the balance of their accounts, whereupon they became the customers of the banking company, and its cashier, without any objection from its directors, kept those accounts and rendered statements thereof, showing a transfer from the former bank, and its depositors were thereby induced to believe and act upon the belief that their deposits and the accounts thereof had been properly transferred to and assumed by the banking company, it is bound by the action of its cashier, and is estopped from questioning its liability upon such accounts.

ID.—NEW TRIAL—SURPRISE—REFUSAL OF CASHIER TO TESTIFY.—The refusal of the cashier to testify for the banking company, when called as its witness, to prove that the plaintiff's testator did not make the deposit in the banking company for which he was credi-

ted, on the ground that such testimony might possibly tend to criminate the witness, and that defendants were surprised by such refusal, is not ground for a new trial, where there was no endeavor to compel an answer, and where it fully appeared at the trial that the deposit was made in a former bank, to the business of which the banking company succeeded, and by its acts became responsible for such deposit.

APPEAL from a judgment of the Superior Court of Humboldt County and from an order denying a new trial. G. W. Hunter, Judge.

The testimony of J. M. Melendy, the attorney referred to in the opinion, was to the effect that he had known J. S. Murray, for twenty-one years, was familiar with his handwriting, and knew the pass-book in question to be in his writing; that it had been shown to him by Archibald Nicholson, for whom he was drawing a will, and whom he advised with reference to the account; and that the pass-book was in Nicholson's possession when it was shown to him. Further facts are stated in the opinion of the court.

S. M. Buck, and C. M. Wheeler, for Appellant.

Gregor & Connick, and Sevier & Selvage, for Respondent.

VAN DYKE, J.—Appeal from the judgment and from an order denying a new trial. The action was for the recovery of the sum of four thousand dollars, the complaint containing two counts—one for money deposited, the other upon an account stated.

The contention on the part of the defendant is that the four thousand dollars alleged to have been deposited by Archibald Nicholson in his lifetime with the defendant bank never was in fact so deposited, and the bank never owed that sum to said Nicholson; that the transfer of the balance due said Nicholson as a depositor in the private bank of A. W. Randall to the account of said Nicholson in the defendant bank was without any consideration moving to the defendant, and was done by the cashier of said defendant bank without its authority.

The court below found, among other facts, that for several years prior to the second day of January, 1892, A. W. Ran-

dall was a private banker and doing and conducting a banking business in the city of Eureka, this state, and that during such time J. S. Murray was said Randall's cashier, and G. L. Roberts his teller. That on said second day of January, 1892, and thence down to April 17, 1897, the said defendant company commenced and conducted a banking business in said city of Eureka; that said defendant for some time occupied the place of business theretofore occupied by said Randall, and that said Murray and Roberts were cashier and teller respectively of said defendant, and A. W. Randall was president thereof; that the other officers of said defendant bank left the entire management of the affairs of said bank in the hands of said president and cashier; that said president and cashier conducted the business of said bank without consulting with the directors of said bank; that the cashier of said bank issued the statement and pass-book in suit to Archibald Nicholson in due course of business of said bank in the usual manner that such statements and pass-book were issued by said defendant bank; that said statement and pass-book is in the regular form usually issued by said defendant bank; that said Archibald Nicholson had no notice that said account had not been duly transferred into the books of said defendant bank, and was led to believe by the officers of said bank, and the matters and things set forth in said findings, that such transfer had been actually made by the proper officers of said bank, and that said bank had assumed said Randall's liability to him believing the said statement, pass-book and entry of the interest thereon to be true, and relying upon such belief said Archibald Nicholson accepted said statement and pass-book as giving the actual condition of his account with said bank; that on the eleventh day of February, 1897, said cashier, Murray, entered upon said pass-book one year's interest on said four thousand dollars; that immediately after it opened for business, in January, 1892, said defendant caused advertisements to be inserted in the newspapers announcing itself as the successor of A. W. Randall in the banking business; that after the formation of the defendant bank said Archibald Nicholson continued to deposit money with it and drew checks on the same just the same as he had previously done with A. W. Randall; that A. W.

Randall went out of the banking business immediately upon the formation of the defendant bank; and that several months prior to the failure of defendant bank said A. W. Randall mortgaged his entire property to said bank to secure eighty thousand dollars then due and owing from said Randall to said bank; that said defendant, the Randall Banking Company, transferred a large number of accounts, involving large amounts existing between the private depositors of A. W. Randall and himself at the time he went out of the banking business, from the books of said Randall's private bank to the books of the Randall Banking Company, and gave said depositors on its books credit for the amount due them as shown by Randall's books in the private bank, and charged the same in his book to A. W. Randall in its account headed "The Randall Banking Company in account with the Randall Bank." That by its course of dealing with said Randall and his depositors in closing up his private banking business, and particularly by its dealings with Archibald Nicholson, deceased, in furnishing him with the statement and pass-book, showing it to be indebted to him in the sum of four thousand dollars or more and charging itself with interest thereon and by lending money to S. F. Pine on his account, and as being his, and upon all of which said Nicholson relied, he was thereby induced to look to said defendant bank for the amount due him instead of the said Randall, thereby losing any remedy he might have had against Randall, who at the closing of said defendant bank was not able to pay his debts out of his own means, and that it was understood and agreed between said parties that the Randall Banking Company should be and was substituted as the debtor to said Archibald Nicholson in the place of A. W. Randall with the intent to release said Randall of the amount due to said Nicholson from said Randall as a banker at the time that said Randall went out of the banking business and the defendant succeeded thereto.

It is not contended on the part of the appellant that the evidence does not support the findings in favor of the plaintiff, but errors are assigned in the admission of evidence, and it is also contended that there was an abuse of discretion in the refusal to grant a new trial on the showing made by the defendant. It is claimed that the court erred in admitting

the testimony of William Nicholson, the brother of the deceased, relative to the pass-book, on the ground that it was not the best evidence. It was, however, shown by testimony not subject to objection that the pass-book was issued by cashier Murray to the deceased, Nicholson, in the usual course of business, and that the contents of the pass-book were in Murray's handwriting, and the court did not err in admitting the pass-book in evidence, because its genuineness was fully established, and was one of the kind usually issued by defendant bank to its customers. It was not error in admitting the testimony of J. M. Melendy, former attorney of said Archibald Nicholson, deceased. His testimony was not in reference to privileged communications between Nicholson and himself, nor his advice thereon. It is also claimed that the court erred in admitting the deposition of A. W. Randall, taken on the part of the plaintiff, as to certain matters stated by him in said deposition, but substantially the same matters were stated in his deposition taken on the part of defendant. In this deposition, taken on the part of defendant, Randall says that he recollects the formation of the Randall Banking Company in 1892, and "after the formation of that company they accepted certain securities of me. I allowed them to accept those that they allowed me to indorse without recourse. They were credited to me upon the books of the company. The money I held in my banking business was turned over to the company to my credit upon their books. Nothing was said about the liabilities of A. W. Randall. The business of A. W. Randall was understood to be transferred to the Randall Banking Company. . . . There was a distinct understanding with me that my business was to be their business. I was to turn over my business to the new bank—transfer my customers to the bank. Had this understanding with the directors of the Randall Banking Company." There are some other objections to admission of testimony, merely stated but not argued, but we do not think them well taken.

The main contention on the part of the appellant is that the witness upon whom it mostly relied at the trial was the former cashier, J. S. Murray, and that when he was placed upon the stand by the defendant he refused to answer ques-

tions on the ground that his answers might subject him to criminal prosecution. On this point the record shows the following:

"Q. Mr. Murray, I will ask you whether Archibald Nicholson, on or about the eleventh day of February, 1896, deposited with the Randall Banking Company the sum of four thousand dollars? A. I shall have to decline to answer the question.

"Mr. Wheeler.—Q. Upon what ground? A. On the ground that I have been arrested and have been prosecuted on account of matters arising out of my connection with the Randall Banking Company, and I have otherwise been subjected to a great deal of annoyance, and under the advice of counsel I decline to answer, because an answer to the question might possibly subject me to further prosecution, for the reason that the answer to the question might possibly tend to criminate me."

Several other questions in the same line were asked the witness, and he declined to answer them for the same reason. It appears from the witness' statement itself that the answers which he might make to the questions might possibly subject him to further prosecution, and might possibly tend to criminate him. It seems that he himself was not certain upon the point, and the court was not called upon to enforce an answer or to determine whether the witness was justified in refusing to answer, nor was any exception whatever taken. It is claimed on behalf of appellant that this conduct on the part of witness Murray was a great surprise to them and deprived them of an opportunity to present their case to the court, and, therefore, it was an abuse of discretion on the part of the court not to grant a new trial on this ground; the record, however, shows that the defendant had as witnesses in its behalf at the trial Guy L. Roberts, who was secretary of the Randall Banking Company, and succeeded Murray as cashier; also several of the directors of the said defendant banking company.

If Murray were to testify, as claimed by appellant he would on another trial, that Nicholson did not make the deposit of the four thousand dollars in defendant's bank, for which he was given credit as stated, it would not follow that

judgment should be given for defendant. It appears from the testimony that the business of Randall's private bank was turned over to the defendant bank, and the directors of said defendant bank permitted Murray, as cashier, to transfer accounts from Randall's private bank and render statements thereon showing that their accounts had been transferred to the Randall Banking Company. Whether they were so transferred on the books of said defendant bank or not, such customers, including Nicholson, were led to believe that their accounts had been properly transferred, and continued to deal with defendant bank accordingly. As stated in *Carpy v. Dowdell*, 115 Cal. 683, in a similar case: "Under these circumstances it is not necessary to determine what power the cashier had merely by virtue of his position as cashier; for when a corporation, by a long course of acquiescence, holds out an officer or agent as having authority to do certain things, it cannot after he has acted repudiate his acts." This rule is supported by many authorities. (Morse on Banks and Banking, 3d ed., sec. 171g, and cases there cited; *Martin v. Webb*, 110 U. S. 7; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604; *Carey v. Philadelphia etc. Petroleum Co.*, 33 Cal. 694.)

Under the circumstances we think the defendant bank was in this case estopped from questioning its liability. "Whenever a party has; by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." (Code Civ. Proc., sec. 1962, subd. 3. To the same effect see *Scott v. Jackson*, 89 Cal. 258; *Dolbeer v. Livingston*, 100 Cal. 617, 621; Bigelow on Estoppel, 4th ed., 445.)

Judgment and order affirmed.

Garoutte, J., and Harrison, J., concurred.

[S. F. No. 1591. Department One.—November 24, 1900.]

THOMAS BAIR, Respondent, v. WARREN WATKINS
et al., Appellants.

FORECLOSURE OF MORTGAGE—APPEAL BY CLAIMANT OF INTEREST IN LAND—NOTICE—FAILURE TO SERVE MORTGAGOR—DISMISSAL.—Upon appeal by the claimants of an undivided interest in mortgaged land, alleged to be not subject to the mortgage, from a decree adjudging the mortgage a lien thereupon and foreclosing it upon the entire premises, and providing for the docketing of a judgment against the mortgagor for any deficiency, the mortgagor has an interest adverse to the appellants, which would be injuriously affected by a modification or reversal of the judgment, and must be served with the notice of appeal. Upon failure to serve him therewith, the appeal must be dismissed for want of jurisdiction to entertain it.

APPEAL from a judgment of the Superior Court of Humboldt County. G. W. Hunter, Judge.

The facts are stated in the opinion of the court.

J. H. G. Weaver, for Appellants.

S. M. Buck, for Respondent.

HARRISON, J.—The plaintiff seeks by this action the foreclosure of a mortgage upon certain real estate executed by Rose Ann Watkins. The appellants herein were made parties defendant to the action, under the allegation that they claimed to have some interest in the land described in the mortgage, and that their interests, if any they have, are subject to the lien of the mortgage. The mortgagor suffered default, and the appellants answered the complaint admitting that they claimed an interest in the land described in the mortgage, but denying that the same was subsequent to or subject to its lien, and they also filed a cross-complaint setting forth their claim of ownership to an undivided one-half of said land, and asking judgment that the mortgage lien of the plaintiff be decreed to be a lien upon only an undivided half of said land. Upon the trial the court made findings of fact to the effect that the mortgagor was the sole

owner of the land at the date of the mortgage, and that the other defendants had no interest therein. Judgment was thereupon rendered in favor of the plaintiff, foreclosing the lien of his mortgage as prayed for by him. From this judgment the defendants, other than the mortgagor, have appealed.

The respondent contends that the appellants are not entitled to be heard, and that their appeal must be dismissed for the reason that their notice of appeal was not served upon the mortgagor, and that, as she would be injuriously affected by any modification or reversal of the judgment, this court is without jurisdiction to act upon the appeal without her presence before it. We are of the opinion that this contention must be sustained.

The judgment declares that the amount found due to the plaintiff from the mortgagor—three thousand three hundred and forty-one dollars and fifty-one cents—is a valid lien upon the mortgaged land, and directs that the land be sold, and that the proceeds of said sale be applied toward the payment of the sums so found due, and that if said proceeds are insufficient to pay the same, judgment for the deficiency shall be docketed against the mortgagor, and that the plaintiff may have execution therefor. It is manifest, therefore, that if the contention of the appellants that the lien of the mortgage should be limited to an undivided half of the land should prevail, and the judgment be modified accordingly, the mortgagor would be injuriously affected thereby. By the judgment, as it now stands, the proceeds of a sale of the entire land are to be applied to the satisfaction of the mortgage lien before a judgment for any deficiency can be docketed against her, whereas, if the appeal therefrom should be sustained, she would be liable for whatever deficiency there might be after applying the proceeds of a sale of one-half of the land. The appellants cannot be permitted to cast this burden upon her without giving her an opportunity to resist their claim, and they, therefore, should have made her a party to the appeal. Not having done so, the court is without jurisdiction to entertain their appeal. (*Harper v. Hildreth*, 99 Cal. 265; *Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224; *Barnhart v. Edwards*, 111 Cal. 428). The proposition of the appellants that, inasmuch as the court has found

that the mortgagor is personally liable for the full amount due to the plaintiff, she would not be injuriously affected by such modification of the judgment, is unsound. Her personal liability cannot be enforced until after a sale of the mortgaged land, and it will be increased by the difference between the proceeds of a sale of the whole of the land and a sale of an undivided half thereof. There is no presumption that the land will sell for any greater sum than the amount of the judgment. If it should sell for the amount of the plaintiff's lien there would be no personal liability to enforce, whereas if only one-half of it can be sold her personal liability might be proportionately increased.

The appeal is dismissed.

Garoutte, J., and Van Dyke, J., concurred.

[S. F. No. 1685. Department One.—November 28, 1900.]

SAMUEL G. MURPHY, Appellant, v. PACIFIC BANK et al., Respondents. SAN FRANCISCO LAUNDRY ASSOCIATION et al., Intervenor.

INSOLVENT BANK—PREFERENCE OF DEPOSITORS NOT STOCKHOLDERS—LOAN TO BANK BY STOCKHOLDERS.—In an insolvent bank incorporated under the act of April 11, 1862, the claims of depositors not stockholders are preferred over those of depositing stockholders, in the absence of a by-law entitling them to share equally with them. But if the stockholder is not a depositor, and has loaned the money to the bank, he is entitled to share equally in the assets with other creditors.

ID.—CONSTRUCTION OF ACT OF 1862—"DEPOSITORS"—ORDINARY CERTIFICATES OF DEPOSIT—LOAN NOT REPRESENTED.—In the act of 1862, the term "depositors" is intended to include not only those who have made deposits in the bank subject to check, but also the holders of ordinary certificates of deposit, not subject to check, which are in the nature of a receipt for a deposit executed by the bank, reciting that a sum specified has been deposited in the bank by the depositor payable to himself or order, upon return of the certificate properly indorsed. Such certificates, though negotiable

and payable immediately, are not notes, and do not represent a loan, nor bear interest not stipulated, but represent the money deposited in the bank to be retained until demanded.

ID.—CONSTITUTIONALITY OF ACT OF 1862—CLASSIFICATION OF DEPOSITORS.—The act of 1862 is constitutional and valid, and is not subject to the objection that it improperly classifies the depositors in a bank, and subjects individuals of the class who are stockholders to special burdens, from which other depositors are exempt. The stockholders constitute the corporation, and are entitled to share in the profits derived from deposits made by those not stockholders, who are merely creditors of the bank; and depositors who are stockholders are not in the same class with depositors who are not stockholders.

ID.—FINDING OF INSUFFICIENT ASSETS—JUDGMENT UPON STOCKHOLDER'S CERTIFICATE—PROVISION FOR STAY.—In an action against the bank by the assignee of a certificate of deposit issued to a stockholder, where the court found that the bank was insolvent, and that its assets were insufficient to pay the preferred depositors not stockholders, in rendering judgment for the plaintiff, such preference could not be secured otherwise than by a stay of the judgment until the preferred creditors should be paid, and it is not objectionable to insert such provision for stay in the judgment. If it amounts to a perpetual stay, because of the insufficiency of the assets, plaintiff is not injured thereby.

ID.—CHANGE OF LOAN TO ORDINARY CERTIFICATES—NEW DEPOSIT.—A stockholder who had made a loan to the bank, and received a time certificate, payable in one year, bearing interest, and after its maturity and part payment had surrendered it as paid, and then received an ordinary certificate of deposit for the balance, and upon further payment received another like certificate, which was outstanding when the bank became insolvent, cannot then be considered as a lender of money to the bank, or entitled to share in its assets with preferred depositors not stockholders. The legal effect of the transactions was that each ordinary certificate of deposit issued represented a new deposit made at its date.

ID.—ASSIGNMENT OF CERTIFICATE—KNOWLEDGE OF INSOLVENCY OF BANK—ASSIGNEE NOT PROTECTED.—Where the certificate of deposit held by the stockholder when the bank became insolvent was assigned thereafter to the plaintiff, who took the assignment with knowledge that the bank was insolvent, and was in liquidation under the bank commissioners' act, it being admitted that the assignor was a stockholder, the plaintiff is not protected, and is not entitled to share equally with preferred creditors not stockholders.

ID.—PROTECTION OF DEPOSITING STOCKHOLDERS UNDER BY-LAW—CHANGE OF BY-LAW—REVISION.—Where an original by-law of the bank entitled stockholders, who were depositors, to share equally in the assets with other depositors, and a subsequent revision of

the by-laws was made, in which that by-law was omitted, and the revised by-laws, when adopted, were declared to be the by-laws of the bank, without suggestion that the new by-laws were amendatory of the former by-laws, such original by-laws ceased to exist, and did not thereafter apply to the protection of depositing stockholders.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Roger Johnson, and A. N. Drown, for Appellant.

Sawyer & Burnett, for Pacific Bank, Respondent.

H. A. Powell, and W. A. Dow, for Intervenor, Respondents.

VAN DYKE, J.—The Pacific Bank, being then insolvent, closed its doors on June 23, 1893, and on November 3, 1893, was duly declared insolvent in a proceeding taken under section 11 of the bank commissioners' act, and since that time has been in liquidation, and at the time this action was commenced had paid six dividends of five per cent each on the unsecured claims of its depositors and creditors, exclusive of creditors who were stockholders, and it was then expected that future dividends amounting to ten or fifteen per cent would be paid.

This action was brought in July, 1896, by the plaintiff, alleging, in substance, that on March 23, 1893, the defendant became indebted to James M. McDonald in the sum of \$73,928.10, for moneys theretofore loaned to it; that at all said times said McDonald was a stockholder in said bank; that said demand was unsecured; that it was payable on demand; that payment of dividends and of the debt had been demanded, and that said James M. McDonald had sold and assigned said demand to the plaintiff.

The answer of defendant, among other things, alleged that for ten years or more last past said McDonald was, and still is, a stockholder in said bank, owning 1,738 shares; that said bank was incorporated under the act of April 11, 1862; that section 10 of said act (Stats. 1862, p. 201) provided that the capital stock and assets of the corporation shall be a security to depositors who are not stockholders, and that at no time did the by-laws of defendant provide that the same

security should extend to deposits made by stockholders, as was permitted by said act, and denied that said money was loaned to the bank by McDonald, and alleged that it was a deposit for which a certificate of deposit was issued.

Plaintiff demurred to the answer, the demurrer was sustained, and judgment rendered for plaintiff. Upon appeal said judgment was reversed, with directions to overrule the demurrer. (See *Murphy v. Pacific Bank*, 119 Cal. 334.) The intervenors are unsecured creditors who are entitled to share in the dividends.

The complaint in intervention and the answers thereto do not change the issues of fact, and need not be specially noticed. Upon the trial the court found against the plaintiff, and judgment was entered against him.

This appeal is by the plaintiff from a portion of the judgment, and from an order denying his motion for a new trial.

The controlling question of fact in the case is whether the said sum of \$73,928.10 was loaned by said J. M. McDonald to the Pacific Bank, or whether it was a deposit. If it was a loan the plaintiff was entitled to recover. If it was a deposit he was not entitled to share in the dividends, as was held upon the former appeal, unless it appeared that the by-laws gave to depositors who were stockholders the same right to share in the assets as was given depositors who were not stockholders.

J. M. McDonald, plaintiff's assignor, testified, in substance, that on July 25, 1890, he had to his credit in the Pacific Bank about \$55,000; that on that day he collected an outstanding loan of a little over \$100,000, and deposited it in the defendant bank, which increased his balance to about \$155,028.75. That on the next day R. H. McDonald, who was then president of the Pacific Bank, proposed that witness should loan \$150,000 to the Pacific Bank for a year, for which he said the bank would pay six per cent interest; that he agreed to do so and drew his check for that amount, which check was put in evidence; that he received from the bank as evidence of his deposit or loan an instrument of which the following is a copy: . . .

"Series C, No. 26,253. Pacific Bank. Oldest Chartered Commercial Bank on the Pacific Coast.

"San Francisco, July 26, 1890.

"Captain James M. McDonald has deposited in this bank one hundred and fifty thousand dollars (\$150,000) in gold coin, payable to himself or order on return of this certificate properly indorsed.

"This certificate to run for one year from date and not to mature before, and to bear interest at the rate of six per cent per annum, payable monthly. Not subject to check.

"(Signed) FRANK McDONALD,

"Cashier.

"R. H. McDONALD,

"President."

The latter part, commencing with "this certificate to run," was in writing; the preceding part was printed, as were the words "not subject to check." It is indorsed "J. M. McDonald," and stamped with the canceling stamp of the bank, "Paid February 25, 1893."

Said witness further testified that on February 25, 1893, he asked for and received \$25,000, and surrendered the foregoing certificate, and received from the bank another certificate for \$125,000, of which the following is a copy:

"Pacific Bank. Series C, No. 36,094. Oldest Chartered Commercial Bank on the Pacific Coast.

"San Francisco, Cal., February 25, 1893.

"Capt. James M. McDonald has deposited in this bank one hundred and twenty-five thousand dollars (\$125,000) in gold coin, payable to himself or order on return of this certificate properly indorsed. Not subject to check.

"W. S. MORSE,

"Teller.

"R. H. McDONALD, Jr.,

"Cashier."

Said certificate is also indorsed "J. M. McDonald," and is stamped, "Paid March 23, 1893." He also testified that on March 23, 1893, he had use for money and asked for and received a payment of \$50,000 on account, and the bank issued another certificate for \$75,000, dated on that day, numbered

series C, No. 36,322, and in the same form as the last preceding one. Indorsed upon it, however, is a credit of \$1,071.90. It was admitted that he assigned the last certificate to the plaintiff about thirty days before suit was commenced, and that plaintiff knew of the insolvency of the bank, and that it was in liquidation at and before said demand was assigned to him.

Several interrogatories were put to the witness by counsel for plaintiff touching the question of interest upon the last two certificates, to which counsel for defendant objected, the objections were sustained and plaintiff excepted. These are mentioned in a general way by appellant, but no discussion of them is attempted. We have examined them, however, and think the objections were properly sustained.

It may be conceded, for the purposes of this opinion, that the original transaction on July 25, 1890, was a loan to the bank by J. M. McDonald. The certificate executed to him by the bank specified, in a clause added to the ordinary certificate of deposit, that it should run for a year, and should not mature sooner, and should bear interest at six per cent payable monthly. On February 25, 1893, this certificate was indorsed, surrendered, and stamped "Paid." On the same day the bank paid to McDonald \$25,000 in money and gave a certificate of deposit from which was omitted all reference to interest or to any specified length of time it should run. It simply recited that he had "deposited in this bank" \$125,000, payable upon return of the certificate properly indorsed. He might have returned in ten minutes and demanded his money. The legal effect of the transaction, as shown by the instruments, was that upon the presentation of the first certificate, duly indorsed, the bank paid McDonald \$150,000, and that he deposited in the bank on that day \$125,000. These remarks apply equally to the payment of the second certificate, and the deposit of \$75,000 evidenced by the third certificate. It is incredible that after requiring a special certificate for the loan of \$150,000 he should continue the loan of \$125,000, part of said first named sum, upon an ordinary certificate without a stipulation for interest, or indorsing the payment upon the original certificate.

Appellant contends, however, that a certificate of deposit

in the ordinary form, such as the second and third certificates above set out, is a promissory note, and assumes that it was for money loaned, and therefore bore interest at the rate of seven per cent, no rate being specified. The improbability of a bank paying seven per cent interest on demand notes is apparent. But appellant expressly admits that a deposit in a commercial bank does not bear interest, in the absence of a stipulation that it shall bear interest; and these certificates upon their face show they were issued by "the oldest chartered commercial bank on the Pacific coast."

But a certificate of deposit issued by a bank is not known as a promissory note, though it is negotiable, is for a sum certain, payable to a specified person, or order, and, no time of payment being specified, is payable immediately. (Civ. Code, sec. 3099.) The same code, however (Civ. Code, sec. 3095), declares "there are six classes of negotiable instruments, namely: 1. Bills of exchange; 2. Promissory notes; . . . 6. Certificates of deposit"; thus distinguishing between them by placing them in separate classes.

It is sufficient for the purposes of this case to say that in the business world, as well as in legislation and the decisions of the courts, certificates of deposit are understood to represent money left with a bank or banker, and which is to be retained until the depositor demands it, the certificate being in the nature of a receipt executed by the bank therefor, in which is usually recited, as in the certificate under consideration, the fact that money has been deposited in the bank by the person to whom the certificate is issued; and we therefore conclude that in the act of 1862, under which the Pacific Bank was organized and existed, that the term "depositors" was intended to include such deposits as well as those made upon open account and subject to check, and that such certificates do not imply a loan in the ordinary sense, nor create the ordinary relation of debtor and creditor evidenced by a promissory note.

Appellant suggests that there is no averment or finding that he had any notice or knowledge that McDonald, his assignor, was a stockholder at the time said certificate was issued. But it is expressly alleged in the complaint that at all of said times McDonald was a stockholder in said bank, and, that allegation not being denied by the answer, no finding was required. He took the transfer of the certificate long

after the failure of the bank, with knowledge that its insolvency had been adjudicated and that it was in liquidation under the statute known as the "bank commissioners' act," and to avoid the force and effect of section 10 of the act of 1862, under which the bank was organized and existed, he alleged that the indebtedness was for money loaned. If the bank were solvent, and a going concern, it could make no difference in its liability whether the certificate were for money loaned or for money deposited; but being insolvent and in liquidation it is required to prefer such creditors as are, under the law, entitled to preference; and, even if that were not true, the intervenors who are creditors claiming an interest in the assets as such can properly litigate the question of priority.

It is again urged that the defendant is not a savings bank. That question need not be discussed. It was held upon the former appeal that "the Pacific Bank, under the act of 1862, and the amendments made by the act of March 12, 1864, was authorized to continue business as a savings bank, or to do a commercial business, or to conduct both under the management of the same board of directors." (See *Murphy v. Pacific Bank*, *supra*.)

Appellant further contends that the by-laws do provide that the capital stock and assets shall be a security to all depositors whether stockholders or not.

The evidence upon this point is to the effect that in 1867 the original by-laws were amended whereby the capital stock and assets were made a security "to all depositors, both stockholders and nonstockholders"; that in 1876 amended by-laws were adopted containing the same provision. But the evidence shows that on January 11, 1886, the annual meeting of the stockholders was held, and adjourned to February 8th on which day "the committee on revision of by-laws reported," and at an adjourned meeting, held the next day, their report was considered. The minutes recite that "the proposed new by-laws having been submitted in writing and filed with the secretary, and it being necessary that at least one month should elapse before the same can be adopted," the meeting was on motion adjourned until March 11, 1886, on which day by-laws consisting of thirteen articles were

adopted, "and the president then declared that more than two-thirds of the capital stock of the bank having voted in favor of the amended by-laws, the same are hereby declared to be the by-laws of the Pacific Bank."

These by-laws were written out in full in the minutes and attested by the president and secretary, and contain no provision making the capital stock or assets security to depositors, whether stockholders or not.

Appellant contends that the provision in the former by-laws which made the capital and assets a security to all depositors, whether stockholders or not, not being mentioned or referred to in the amended by-laws, was continued in force.

We think this contention cannot be sustained. Upon the face of the minutes of these meetings of the stockholders it appears that a committee was appointed to revise the by-laws; that "new by-laws" were submitted and adopted and declared "to be the by-laws of the Pacific Bank." These by-laws appear to be complete and full, and nowhere in the by-laws so adopted is there any suggestion that the new provisions are amendatory of the former by-laws.

Again, it is contended that the act of 1862 is unconstitutional. It was so contended upon the former appeal, upon certain grounds then urged, and it was held to be not unconstitutional. (*Murphy v. Pacific Bank, supra.*)

It is now contended that the said provision of the act of 1862 is unconstitutional for the reason that "it selects particular individuals from a class and subjects them to peculiar rules and imposes upon them special burdens from which others in the same class are exempt."

But said provision is not obnoxious to the constitution upon that ground. Depositors who are stockholders are not in the same class with depositors who are not stockholders. The stockholders constitute the corporation and share in the profits to be derived from deposits made by nonstockholders, while the latter do not. They are purely creditors and have no other relation to the bank; while the stockholders are creditors as to their deposits and as members of the corporation, and through it are debtors to the nonstockholding depositors, and no wrong or hardship is done them when the profits de-

rived from the deposits and other assets of the corporation are applied first to the payment of the demands of those who are not stockholders.

Objection is also taken by appellant to the conclusions of law and to that part of the judgment quoted below.

The judgment is that plaintiff recover from the Pacific Bank the sum of \$73,928.10, with interest from June 23, 1893; "that said sum and interest shall not be payable until after the payment in full of all indebtedness due by the defendant to its depositors who are not stockholders, and execution is stayed upon this judgment until that time; and it is further adjudged that said plaintiff do not recover any dividends on said sum or interest thereon until after payment of all indebtedness due by defendant to its depositors who are not stockholders"; and that neither party recover costs.

We see no valid objection to the portion of the judgment appealed from. The part not appealed from is an ordinary judgment for the recovery of a specified sum of money, being the amount remaining unpaid upon the certificate of deposit with interest. But the court found that the defendant was and is insolvent and in liquidation under a judgment in the case of *People v. Pacific Bank*, entered November 3, 1893, and that its assets were and are insufficient to pay those depositors who were not stockholders, and that they were entitled to be first paid. This preference could not be secured otherwise than by stay of the judgment until the preferred creditors should be paid. No objection is made to the fact that the stay is made part of the judgment, rather than by a separate order, but it is said that it is repugnant to the judgment because it amounts to a perpetual stay. Plaintiff had a just demand against the defendant for the amount of his certificate, and the court could not say that he was not entitled to judgment, but could and did say that he was not entitled to enforce it against the bank until the preferred creditors were paid. That it may amount to a perpetual stay is true, but if it does it will be because the assets are insufficient to pay the preferred claims; and, if so, plaintiff is not injured.

The findings are justified by the evidence, and we find no error that would justify a reversal.

The judgment and order appealed from are affirmed.

Harrison, J., and Garoutte, J., concurred.

[S. F. No. 1420. Department One.—November 28, 1900.]

W. J. FIFIELD, Appellant, v. SPRING VALLEY WATER WORKS, Respondent.

RIPARIAN RIGHTS—INJUNCTION—DIVERSION OF FLOOD WATERS BY WATER COMPANY.—A riparian proprietor is not entitled to an injunction to restrain a water company engaged in supplying water for public use from diverting the surplus storm or flood waters of a creek, which will not prevent the flowing over his land of the ordinary waters of the stream, nor in any way damage his land nor interfere with the rights appurtenant thereto.

Appeal from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Ben Morgan, for Appellant.

M. B. Kellogg, for Respondent.

VAN DYKE, J.—The plaintiff and appellant is the owner of a certain tract of land in San Mateo county, through which the waters of San Mateo creek flow in a natural channel. The defendant is a corporation conducting and carrying on the business of supplying the inhabitants of the city and county of San Francisco with water. It is charged in plaintiff's complaint that defendant is engaged in constructing a tunnel above plaintiff's land, with the intent and purpose of diverting through said tunnel, when completed, the waters of said creek into the San Andreas reservoir, thereby preventing the same from reaching or flowing through the land of the plaintiff. And an injunction is prayed to prevent the defendant from so diverting the waters of said creek.

In defendant's answer it is denied that said defendant threatens, or ever has threatened, or intends to divert the waters of said creek as in the complaint alleged, but avers that it only intends to divert through said tunnel the storm or flood waters, and none of the ordinary flow of said stream.

The court finds that it is not the object of defendant in constructing said tunnel to divert any of the waters of said creek into said San Andreas reservoir, except said storm or flood waters, or waters flowing in said creek during times of extra high water or freshets in said stream, nor in any other way, nor to any other extent, to prevent the waters of said creek from reaching or flowing through the lands of the plaintiff. The judgment and decree entered upon the findings is, after defining storm or freshet waters to be such waters as flow down a stream during and after a rain storm and which are in excess of the ordinary flow, "that the defendant is hereby enjoined and restrained from diverting or in any way restraining, at any time or times, the ordinary flow of water in San Mateo creek through the lands of plaintiff, as said ordinary flow is above described and defined; and that the defendant be, and it is hereby, permitted and authorized, by the flume and tunnel mentioned in its answer, as above plaintiff's said land or otherwise, to take and divert from said San Mateo creek, above the said lands of plaintiff in the complaint described, the storm or freshet or flood waters (as above described or defined) that may flow in or into said San Mateo creek above said lands, during times of extraordinary high water or freshet in said creek or stream, provided that defendant permits at all times all the ordinary flow of said creek to go down to plaintiff's lands, and provided that defendant shall make such diversion so as not at any time to stop or divert any of the said ordinary flow above plaintiff's said lands, and provided that it uses, and it is hereby directed to use in the premises, mechanical means capable of accomplishing and actually accomplishing such results as aforesaid, namely, permitting at all times all the ordinary flow of said San Mateo creek to go down to said plaintiff's lands described in the complaint, and so constructed as not at any time to stop or divert any of said ordinary flow down said creek to said plaintiff's said lands."

The respondent contends that there is no appeal in this case from the judgment in question, for want of a proper notice. It must be admitted the notice is unusual in form. The law requires a notice to state that the appeal is taken from the judgment or order appealed from, "or some specific part thereof." (Code Civ. Proc., sec. 940.) Here the notice reads that the plaintiff in the above-entitled action appeals from the judgment therein given in favor of the defendant in said action, and against said plaintiff, "and from the whole of said judgment, and particularly that portion of said judgment whereby defendant is adjudged entitled to divert a portion of the waters of San Mateo creek." But the judgment here is not in favor of the defendant, but is in favor of the plaintiff, and he is awarded his costs in the action. Plaintiff can hardly be presumed to have intended to appeal from a judgment in his favor; but from a literal reading of the notice, however, it might bear that construction, for it reads "and from the whole of said judgment, and particularly that portion," etc. However, it is not necessary to pass upon this objection to the notice of appeal, for the case must be disposed of in favor of the respondent upon the merits.

The court finds that the diversion of the storm or flood water by defendant as proposed "will not damage said land in any way, nor in any way interfere with plaintiff's right in the premises, or with the rights appurtenant to said land." This being so—and the finding upon this appeal from the judgment must be taken as conclusive—the plaintiff is not injured and cannot be damaged by the diversion of storm or flood water, hence is not entitled to an injunction restraining the diversion of such storm or flood water. In *Modoc Land etc. Co. v. Booth*, 102 Cal. 151, the court say: "It seems clear, however, that in no case should a riparian owner be permitted to demand, as of right, the intervention of a court of equity to restrain all persons who are not riparian owners from diverting any water from the stream at points above him, simply because he wishes to see the stream flow by or through his land undiminished and unobstructed. In other words, a riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of

water above him by a nonriparian owner, when the amount diverted would not be used by him and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it. If this be no so it would follow, for example, that an owner of land bordering on the Sacramento river in Yolo county could demand an injunction restraining the diversion of any water from that river for use in irrigating nonriparian lands in Glenn or Colusa county. And yet no one probably would expect such an injunction, if asked for, to be granted—or, if granted, to be sustained.”

In *Edgar v. Stevenson*, 70 Cal. 286, it was held that a riparian proprietor who has appropriated and uses all the water of a stream crossing his land, as it ordinarily flows, cannot restrain the diversion during times of extraordinary high water of the surplus not used or appropriated by him. (See, also, *Heilbron v. '76 Land etc. Co.*, 80 Cal. 189; Black's Pomeroy on Water Rights, sec. 75.)

Judgment affirmed.

Harrison, J., and Garoutte, J., concurred.

[S. F. No. 1726. Department One.—November 28, 1900.]

FRANK KIMMELL, Respondent, v. MARGARET SKELLY, Appellant.

BROKER'S COMMISSION—SALE BY OWNER—VALIDITY OF CONTRACT—CONTINUANCE OF EMPLOYMENT.—A contract between the owner of real estate and a firm of brokers, making them exclusive agents to sell, and agreeing to pay them a specified commission upon any sale made by them, or by anyone else, including the owner, during the existence of the contract, which was to continue for thirty days and until withdrawn by the owner in writing, is valid and binding upon the owner according to its terms. In the event of a sale by the owner after the thirty-day period, the employment not having been previously withdrawn in writing, he is liable for the agreed commission.

ID.—CONSTRUCTION OF CONTRACT—SALE NOT A WITHDRAWAL IN WRITING.—The contract cannot be construed to allow that a sale and

deed by the owners should constitute a withdrawal in writing pursuant to the terms of the contract, so as to defeat the broker's commission, which was expressly to be paid in the event of such sale before the withdrawal; and the sale could not constitute a withdrawal before the sale was made.

ID.—CONSIDERATION—SERVICES OF BROKERS—FINDING OF PURCHASER.—

The consideration for the contract of the owner to pay a commission upon their own sale during the existence of the contract consisted of the agreed services of the brokers in attempting to find a purchaser. If they performed such services, the fact that no purchaser was found by them cannot defeat the contract, which was more than an ordinary broker's contract. The parties were at liberty to make the compensation of the broker depend upon any lawful condition agreed to in the contract; and the only question in such case is as to what the contract provides.

ID.—FRAUD OR MISTAKE—NEGLECT OF OWNER TO READ CONTRACT—RE-

LIANCE UPON STATEMENTS OF BROKERS.—The neglect of the owner, who had the ability to read the contract and who was furnished with a copy thereof, to read it in its entirety before signing it, and her reliance upon the statements of the brokers as to its contents, is only proof of negligence upon her part, and cannot entitle her to set aside the contract on the ground of fraud or mistake. There was no special relation of trust, or confidence between the owner and the brokers; and she was not entitled to rely upon their statements as to the contents of the contract.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Edward A. Belcher, Judge.

The facts are stated in the opinion of the court.

Mullany, Grant & Cushing, and O. K. Cushing, for Appellant.

The plaintiffs were employed as brokers to sell the property, and they must have found a purchaser ready and willing to purchase to entitle them to their commission. (*Gonzales v. Broad*, 57 Cal. 224; *Middelton v. Findla*, 25 Cal. 76; *Phelps v. Prusch*, 83 Cal. 626; *Smith v. Schiele*, 93 Cal. 144; *Gunn v. Bank of California*, 99 Cal. 352; *Oullahan v. Baldwin*, 100 Cal. 660; *Martin v. Ede*, 103 Cal. 161; *Garberino v. Roberts*, 109 Cal. 125; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 383.¹) On the whole case, it appears that it was the intention of both parties to limit the contract to thirty

¹ 38 Am. Rep. 441.

days. The contract shall be construed against the brokers, who furnished their own studiously prepared and printed form. (*Berliner v. Travelers' Ins. Co.*, 121 Cal. 458, 466.²) And it being subject to withdrawal (*Brown v. Pforr*, 38 Cal. 550), the terms "while this contract is in force" should be limited to the written period of thirty days prescribed. Under all of the circumstances, the defendant should not be further annoyed or subjected to any loss or penalty, by reason of the claim here asserted, which depends upon a clause of the contract which should be rejected as contrary to the intention of the parties. (Civ. Code, secs. 1640, 1651, 1653; *Jackson v. Puget Sound Lumber Co.*, 123 Cal. 97, 100, 101; *ard v. Yorba*, 123 Cal. 447; *Learned v. McCoy*, 4 Ind. App. 238.) There is no consideration for plaintiff's claim, no purchaser having been found, and this affirmatively appears. (Civ. Code, sec. 1639; *Brickell v. Batchelder*, 62 Cal. 639.) This is an action to recover a penalty from defendant for doing the lawful act of trading off her own property, after the exclusive agency really contracted for had expired, and such an action should fail. (3 Parsons on Contracts, 157.)

Lent & Humphrey, for Respondent.

The terms of the contract must govern this case, and the finding of a purchaser is not essential under its terms. (*Crane v. McCormick*, 92 Cal. 176, 181, 182; *Maze v. Gordon*, 96 Cal. 61, 66, 67; *Rucker v. Hall*, 105 Cal. 425, 426, 428.) The defendant, not being illiterate, was bound to know the contents of the instrument she signed, and was not entitled to rely upon any representation as to its contents. (*Hawkins v. Hawkins*, 50 Cal. 558; *Crane v. McCormick*, *supra*; *Commissioners etc. of San Jose v. Younger*, 29 Cal. 172; *Finlayson v. Finlayson*, 17 Or. 347³; 2 Kent's Commentaries, 484; 1 Story's Equity Jurisprudence, sec. 195 et seq.; 8 Am. & Eng. Ency. of Law, 643.)

GAROUTTE, J.—This action is brought by the assignee of the real estate firm of Hooker & Lent, and is based upon

² 66 Am. St. Rep. 49.

³ 11 Am. St. Rep. 836.

a broker's contract entered into by defendant April 10, 1897. The material parts of this contract are as follows: "For and in consideration of the services to be performed by Messrs. Hooker & Lent, I hereby employ them as my sole and exclusive agents to sell for me that certain real property. . . . This employment and authority shall continue for the full period of thirty days from the date hereof and thereafter until withdrawn by me in writing; and I agree to pay to said Hooker & Lent, in the event of the sale of said real property by them or by anyone else, including myself, while this contract is in force, two thousand two hundred and fifty dollars as and for their compensation hereunder." Some weeks after the expiration of the thirty-day period specified in the instrument, but before any withdrawal of the employment of the brokers by defendant in writing had been made, defendant sold the property. This action was then brought and judgment recovered for the sum of two thousand two hundred and fifty dollars. It is conceded that the brokers found no purchaser for the property, but the evidence shows and the findings of fact are to the effect that they spent time and money in an attempt to find a purchaser.

As far as the merits of this litigation are concerned, it is not material that the sale made by defendant took place after the expiration of the thirty-day period named in the contract; for the contract was in force for thirty days, and *thereafter* until a certain written notice was served on the brokers revoking it, and this notice had not been served when the sale was made. For this reason the contract was in full force and effect at that time. It had exactly the same binding effect upon defendant at the time of the sale, as it would have had if the sale had been made within the first thirty days of its life. If the brokers had found a purchaser at any time prior to the sale made by defendant, then clearly they would have been entitled to their commission; and this circumstance alone shows that the contract was in full force and effect when the sale was made.

It is suggested by appellant that the sale by her was in effect a withdrawal in writing of the employment of the brokers, and thereby put an end to the contract. This contract cannot bear that construction. A sale by the defendant,

followed by her deed, was not the writing contemplated by the terms of the instrument. This is doubly apparent, for defendant agreed by its terms to pay the brokers the amount specified if she herself sold the property; again, if this deed of the property to her grantee should be construed as a withdrawal in writing of the employment of the brokers, it certainly could not be construed as a withdrawal of their employment before the sale was made.

It is claimed that the brokers' contract was one to find a purchaser, and, no purchaser having been found, no commissions were earned, and that for this reason the complaint does not state a cause of action. The contract in this case is not the ordinary broker's contract; it is more. By its terms the brokers were entitled to two thousand two hundred and fifty dollars if during the life of the instrument they found a purchaser; or if during its life defendant sold the property, they were likewise entitled to the same amount. Defendant having sold the property during the life of the contract, this last provision is relied upon to support a recovery, and justly so. The defendant made a contract and had the power to make it; and there is no reason why she should be allowed to escape from its binding force, unless equitable grounds exist which excuse her. The parties to a brokers' contract are at liberty to make the compensation of the broker depend upon any lawful conditions they see fit to place therein. The single question is, What does the contract provide?

It is insisted that there is no consideration to support the contract, but with this contention we cannot agree. Defendant employed the brokers to find a purchaser for her real estate, and, in consideration of the services to be performed, she agreed to pay them two thousand two hundred and fifty dollars when they found a purchaser. She also further agreed to pay them the same amount in consideration of their services if she herself sold the property. The consideration for her promise to pay the money if the sale was made by her, was the performance of services by the brokers in seeking a purchaser. Their compensation for these services was the amount of money made payable by the instrument, and paya-

ble when the land was sold by her, or some one other than the brokers. This is a fair reading of its terms, and the only reasonable construction which can be given it. It was proven by the evidence, and found as a fact by the court, that services by the brokers were performed, and hence a consideration for her promise was established.

The authorities in this state hold contracts similar to the one at bar legally enforceable. In *Crane v. McCormick*, 92 Cal. 176, the contract provided: "And in consideration of your expenses and efforts in attracting settlers to the county, it is agreed that in event of the withdrawal of said property from sale, or in event of sale through any means during the continuance of this power, the same commission will thus be paid as though sale had been made by you." This provision was held valid, the court saying: "Plaintiff's right of action is based solely upon the provision of the contract that if the defendants withdrew the property from sale, or effected a sale in any manner during the year, the same commissions would be paid as if the sale had been made by De Jarnett & Crane. . . . Defendants agreed for a valuable consideration to pay the commissions if a sale should be effected in any way during the year; their agents, acting upon the agreement, at their own expense, caused a large number of pamphlets and circulars to be printed and sent to various parts of the world, advertising and offering for sale certain tracts of land, including the land described in the contract. A real estate agent's right of recovery depends entirely upon his contract with the owner of the land." In *Maze v. Gordon*, 96 Cal. 61, the court said: "It was not essential to make out plaintiff's case that he should have found a purchaser. By the terms of the employment commissions become due 'in the event of withdrawing the sale of said property during the time.' The claim to compensation under this provision of the contract is not, as respondent suggests, damages for a breach of the contract in withdrawing the land from sale. This Hamilton had a right to do, and in such event he became indebted to plaintiff for his commissions." The same question arose in *Rucker v. Hall*, 105 Cal. 426, and the court again reiterated

the rule laid down in the two cases cited. The question here presented is purely one of construction of this particular contract, and it is immaterial what may be the judicial construction given the ordinary broker's contract. The brokers here did not agree to find a purchaser, but being employed to find one, they were agents of defendant to that end, and were legally bound to use their time and labor for the benefit of their principal; and it is the use of this time and labor which forms the consideration to support her promise to pay them the compensation mentioned in the agreement.

If this contract had provided in terms that, "in consideration of the brokers' efforts to secure a purchaser, whether or not those efforts were successful, defendant would pay the amount agreed upon as commissions in case she herself sold the property during the life of the contract," I see no possible legal objection to the validity of that kind of a provision and in substance that is this contract.

There is some claim made that fraud was practiced upon defendant in securing her signature to the instrument. But we find nothing in the evidence tending to show either fraud or mistake. It may be conceded that she signed the document without reading it in its entirety, or it may be conceded even that the brokers made misstatements to her regarding its contents; yet these things are not sufficient in equity to set it aside. Defendant could read, and she declares that she did read a part of the writing. She was furnished with a copy of the instrument and had ample time to examine its contents at her leisure. No special relation of trust or confidence existed between her and the brokers. And even upon her own showing all that can be said is, that she carelessly and negligently signed the contract without reading it, and relied upon the statements of the other party to it as to its contents, and that party was one upon whom she had no legal right to rely.

It is contended that some of the findings of fact are not supported by the evidence. This may be considered to be true as to some immaterial findings. But as to those findings of fact necessary to maintain the judgment we hold the evidence sufficient to support them.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

[Crim. No. 614. In Bank.—November 28, 1900.]

THE PEOPLE, Respondent, v. OLIVER EMERSON, Appellant.

CRIMINAL LAW—HOMICIDE—SELF-DEFENSE—SUPPORT OF VERDICT.—A verdict of conviction of murder in the first degree cannot be disturbed upon appeal by reason of evidence of self-defense and of the absence of a deliberate intent to take life, where the evidence which bears against the defendant, considered by itself and without regard to conflicting evidence for the defendant, tends to support the verdict.

ID.—INSTRUCTION AS TO SELF-DEFENSE—FEAR OF PRESENT DANGER—APPEARANCES.—The following instruction is correct: "A bare fear that a man's life or limb is in danger is not sufficient to justify a homicide, but in order to justify a man in taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable man, and the party killing must have acted under the influence of such fears alone. The danger must be present, apparent, and imminent, and the killing must be done under a well-grounded belief that it was necessary for the defendant to kill the deceased at that time to save himself from great bodily harm." Such instruction is not inconsistent with correct instructions immediately following as to the right of the defendant to act upon appearances, whether the danger was real or only apparent.

ID.—EVIDENCE OF ACTUAL DANGER—DOCTRINE OF APPARENT DANGER.—Where the only danger proved in the case is an actual danger, it is not important to impress the jury with the doctrine that an apparent danger may be such as to justify a killing.

ID.—PLEA OF NOT GUILTY—IMPEACHMENT OF RECORD—ANNOUNCEMENT OF COUNSEL.—After the jury is impaneled and sworn to try a plea of "not guilty," entered upon the record, as the plea of the defendant, he cannot be permitted to impeach the record by proof that the plea was announced by his counsel, and not by himself. If he stood mute, the entry of such plea was proper.

ID.—EVIDENCE—CALLING OF WITNESS TO PLACE OF DEATH—CONTRADICTION BY WITNESS—REBUTTAL—REPETITION OF TESTIMONY—HARMLESS RULING.—Where the prosecution had proved in chief that the son of the deceased, after the shooting, called a witness to the place where his father lay dead, and such witness testified for the defendant that he was called by the son before the shooting, though it may have been a technical error to permit a witness for the prosecution merely to repeat in rebuttal his testimony in chief that the calling took place after the shooting, the ruling permitting it was harmless. It was material to the people's case to rebut the evidence of the witness for the defendant.

APPEAL from a judgment of the Superior Court of Tullumne County and from an order denying a new trial. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

W. S. Barnes, and J. B. Curtin, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

BEATTY, C. J.—Appellant was convicted of murder in the first degree and sentenced to death. His appeal is from the judgment and from an order denying his motion for a new trial.

The principal ground of the appeal is that the verdict is contrary to law and the evidence, and upon this point counsel contend that all the evidence—that introduced by the prosecution no less than the evidence of the defendant himself—shows clearly and without conflict that the killing (which is admitted) was done in necessary self-defense, or at least under circumstances which negative the existence of any deliberate purpose on the part of the defendant to take the life of the person slain. Necessarily, this contention as to the absence of any conflict in the evidence must be made good in order to sustain the appeal upon the ground stated; for if the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive.

The circumstances of the homicide, as detailed by the witnesses for the prosecution, were substantially as follows: The defendant was the owner of a ranch which he had leased to Joseph Rodgers, reserving to himself a right to occupy, for living purposes, a certain portion of the premises. Rodgers, with his wife and eight children—the oldest eighteen, the youngest four years of age—entered into the possession of the ranch and ranch-house in December, 1898, but defendant continued to occupy one bedroom in the dwelling-house, and a room in an outhouse which he used as a kitchen. Very soon after this joint occupancy of the premises commenced, serious differences arose between the defendant and Rodgers and his family, the original cause of which seems to have been a dispute as to the right of defendant to retain for his own use the bedroom in the house. What the merits of this quarrel were does not appear, but it evidently produced a very bitter antagonism between the parties, and had eventuated in a suit for damages commenced by Rodgers. Things being in this posture on the morning of the 11th of April, 1899, defendant and Rodgers met at the well near the ranch-house. At an earlier hour that morning the defendant had removed the rope and bucket used for drawing water from the well for the purpose, as he says, of mending the bucket, which was out of repair. Leaving the well in that condition he had gone out to a pasture to look for a cow that he was expecting to calve. On his return he found Rodgers at the well engaged in fitting another rope and bucket for drawing water. What then ensued is told by the wife and three children of Rodgers, who were in the house, but within hearing, when the quarrel commenced, and out at the well before it reached its fatal conclusion. The first words which they distinctly heard were from Rodgers, who said to defendant: "You can't get any more water out of this well; this is the second well you have kept me getting water from." Defendant said he would get water whenever he wanted it. Rodgers said: "I would like to see you come and try to get some now." Defendant said: "I don't want any now; I will get it when I need it." At this point Mrs. Rodgers interjected what I suppose is a quotation from the lease in regard to "water rights and privileges," to which defendant replied: "Yes, for your own use." Then Rodgers said again: "You

can't get any water here; you have to go to the creek." To which defendant responded by an expression at once contemptuous and unfit to be made in the presence of a woman, whereupon Mrs. Rodgers again interposed with the remark: "That shows how you were raised." Defendant then said: "Where was you raised?" She replied: "I was well raised." Defendant repeated: "Well, where were you raised?" and she again replied: "I was well raised." Then he said: "I have seen you before," and she demanded to know "where." "Well," he said, "I have seen you before you ever came here." With these words the defendant turned to leave, carrying a milk bucket in one hand and a coil of rope in the other—which articles he had held in his hands during the whole colloquy. As defendant moved away from the scene of the quarrel he was followed and apparently overtaken and stopped by Mrs. Rodgers, who demanded again and again to know where he had seen her before. Turning to answer her he saw before him not only Mrs. Rodgers, but her husband also, who held in his hand a stone as large as he could grasp with one hand, and who, in advancing upon defendant, said: "I want to know what you mean; I want to know where you ever saw her before?" At this instant defendant drew his pistol and commenced firing. His first bullet passed through Rodgers' thigh, who immediately dropped the stone which he carried and turned to run, but before he had moved perceptibly a second bullet entered his head two inches above and one inch behind the left ear, producing a wound which caused almost instant death.

This account of the circumstances immediately surrounding the killing is taken from the testimony of Mrs. Rodgers. It is corroborated and not materially varied by the testimony of three of her children—aged from nine to seventeen years—who arrived upon the scene during the progress of the quarrel between defendant and deceased. The only other material testimony for the prosecution was that of the coroner and autopsy surgeon, who testified to the cause of death, and of a witness who testified that about a week before the homicide he heard defendant say he would "put Rodgers where the dogs would not bark at him."

The only evidence for the defense which it is material to

state in this connection was the testimony of the defendant himself. He recounted the quarrels and the litigation between himself and Rodgers growing out of the leasing and joint occupation of the premises, detailed the facts from which he had inferred an intention on the part of Rodgers to do him some injury, stated that he had been warned that it was necessary to be prepared to defend himself—that he only commenced carrying a pistol in consequence of such warning, and only shot because at the moment he believed his life to be in danger from the attack of Rodgers with the stone which he held in his hand. He gave a version of the quarrel at the well not widely different from that of Mrs. Rodgers and her children, but somewhat more favorable to himself. In particular, he denied the use of the indecent expression attributed to him by Mrs. Rodgers, and stated that he used other words of similar sound, but not at all offensive.

Upon this evidence a jury has found—and the finding has been approved by the trial judge—that the defendant is guilty of murder in its highest grade, and that he deserves to suffer the extreme penalty of the law. We are asked to say, as matter of law, that this verdict is so entirely without support in the evidence that it cannot stand. But after the most careful consideration of the case we do not feel ourselves justified in setting aside the verdict upon this ground. Certainly, the showing against the defendant was not a strong one as to the question of deliberation such as characterizes murder of the first degree. He did not seek or provoke the quarrel which was the immediate cause of the killing. He did not show himself at all aggressive in the course of the altercation, and all the evidence shows that he had turned to leave the scene of the trouble, and would have done so but for the conduct of Rodgers and his wife in following him up and angrily demanding to know where he had seen her before. All this is inconsistent with an intention on the part of the defendant to seek the life of Rodgers at that time, and strongly corroborates his claim that he was only induced to fire by the belief that he was in danger of fatal or serious injury from the threatened attack of Rodgers, armed as he was with a stone which in the hands of a strong and determined man at close quarters is always a dangerous and often

a deadly weapon. But, on the other hand, the long-standing quarrel and bitter hostility of the parties, the preparation for trouble evidenced by the constant carrying of a loaded pistol, and the threats to put Rodgers "where the dogs would not bark at him," were items of evidence from which the jury might infer a premeditated design to kill, and the fact that the fatal wound was inflicted after the deceased had dropped his weapon, and had turned, or was in the act of turning to run, was evidence which certainly tended to show that defendant was not acting solely with a view of defending himself from death or serious bodily injury.

True, none of these circumstances is at all conclusive, nor are all together. Judging by so much as is disclosed by this record, the quarrel between the parties was not exclusively of defendant's seeking, nor was he particularly active in promoting it. On the contrary, the deceased seems to have been the aggressor. The act of defendant in arming himself may well have been prompted, as he claims it was, solely by fear of violence, of which he had been warned. His threat to put Rodgers "where the dogs would not bark at him" may have been idle and meaningless. His second and fatal shot, fired after Rodgers had dropped his weapon and turned to run, may have been caused by a failure to observe under the excitement of the moment that his adversary was endeavoring to avoid further conflict. But all these matters and their full significance were for the jury to weigh and determine, and their verdict, having substantial evidence to support it, cannot be disturbed unless it is vitiated by some erroneous ruling of the court.

That the trial court did err in its rulings, and particularly in its charge to the jury, is the second ground of the appeal. The appellant claims that the instructions given were contradictory upon a material point, and that the court neglected to give other instructions, which it was its duty to give, and by the omission of which he was seriously prejudiced. The particular matter to which he calls attention in this connection is the use of the following language by the court in charging upon the law of self-defense: "The danger must be present, apparent, and imminent, and the killing must be done under the well-founded belief that it was necessary for the defendant to kill the deceased at that time to save him-

self from great bodily harm." It is contended that this part of the charge is in conflict with other instructions which properly state that the danger need not be actual if there is such an appearance of danger as to induce a reasonable man to believe in its actual presence. But, though the language quoted, considered by itself, may imply that the danger must be actual, and that a merely apparent danger will not justify a killing upon the ground of self-defense, yet when it is read with its context as it was given it will bear no such construction. The entire charge upon this point reads as follows: "A bare fear that a man's life or limb is in danger is not sufficient to justify a homicide, but in order to justify a man in taking the life of another in self-defense the circumstances must be sufficient to excite the fears of a reasonable man, and the party killing must have acted under the influence of such fears alone. The danger must be present, apparent, and imminent, and the killing must be done under a well-founded belief that it was necessary for the defendant to kill the deceased at that time, to save himself from great bodily harm. If the defendant believed himself to be threatened with danger, he was justified in determining from appearances and the actual state of things surrounding him as to the necessity of resorting to self-defense, and if he acted from reasonable and honest convictions he cannot be held criminally responsible for a mistake in the actual extent of the danger, when other judicious men would have been alike mistaken. In measuring the danger to himself the defendant was entitled to act upon appearances, and if the appearances were such as to induce in him a reasonable and well-grounded belief that he was actually in danger of losing his life or suffering great bodily harm, he was justified in defending himself, whether the danger was real or only apparent."

This is a correct and very clear statement of the law, and it is further emphasized by several special instructions to the same effect, given at the request of the defendant. And, moreover, this was not a case in which it was important to impress upon the jury the legal doctrine that an apparent danger is sufficient to justify a killing. That doctrine is material and important only in those cases—frequently occurring—where it turns out that a danger apparently imminent

at the time of the killing was in reality nonexistent—as in the case of an assault with an unloaded gun. In this case, the danger, if there was danger to the defendant, was as apparent to the jury as it was to him. What he saw was proven to them, and whatever he had to apprehend they could see was an actual danger. The court did not err in this matter.

It is next objected that the court omitted to give instructions on certain material points. We cannot see that any of these points required further elucidation than they received in the general charge of the court, and some of them were wholly immaterial. No such instruction as the tenth instruction in *People v. Bushton*, 80 Cal. 162, was given, and, therefore, no qualification or explanation of it was called for.

There is nothing in the point that the court erred in proceeding to try the case before issue joined. The record shows that the defendant entered a plea of not guilty at the time of his arraignment. An attempt was made, after the jury had been impaneled and sworn, to impeach the record by proving that in fact the plea of defendant had been announced by his counsel, and not by himself. It was in his presence, however, and was the plea which would have been entered under the direction of the court if the defendant had stood mute. If, when called upon to plead, he did not make the plea announced by his counsel, he did stand mute, and the plea of not guilty was properly entered. If it had been a plea of guilty, there might have been a more serious question about it. As it was, the court very properly refused to hear any testimony to impeach the record.

Finally, it is contended that it was error to allow Elmer Hill to testify in rebuttal that Guy Rodgers called Woods to the scene of the homicide after the shooting. Both Hill and Guy Rodgers had testified to the same thing in chief. For the defense Woods testified that he had been called in by Guy Rodgers before the shooting. It may have been a technical error to allow in rebuttal proof of the same fact that had been made a part of the case in chief, but it could have done no harm to allow one of the witnesses merely to repeat what he had said before. It is further objected to this testimony that it was incompetent to prove a declaration made by Guy

Rodgers not in the presence of the defendant. The so-called declaration of Guy Rodgers was his calling to Woods to come to the place where his father lay dead. This calling was itself the fact to be proven; and if, as contended, it was highly material to defendant's case to show that it occurred before the shooting, it was necessarily material to the people's case to rebut evidence to that effect.

We find no error in the case. The judgment and order of the superior court are affirmed, and the cause remanded for further proceedings upon the judgment.

Van Dyke, J., Harrison, J., McFarland, J., Temple, J., and Garoutte, J., concurred.

[S. F. No. 1622. Department One.—November 30, 1900.]

In re CORRALITOS CO-OPERATIVE DRYING AND
CANNING COMPANY, an Insolvent Debtor.

INSOLVENCY—PETITION BY ASSIGNEE TO SELL ESTATE—TITLE OF ASSIGNEE.—By an adjudication in insolvency the property passes from the insolvent debtor, and comes under the control of the court; and a petition for the sale of the estate of the insolvent, which alleges that the petitioner is the duly appointed, qualified, and acting assignee of the estate of the insolvent, and as such assignee has taken possession of all the estate described in the petition, schedule, and inventory of the insolvent, is not objectionable for not alleging specifically that the property of the insolvent has been assigned to the petitioner.

ID.—DESCRIPTION OF PERSONAL PROPERTY IN PETITION—REFERENCE TO SCHEDULE AND INVENTORY.—A petition by the assignee for an order to sell the property of the insolvent need not describe the personal property in detail; but it is sufficient to refer to the schedule and inventory on file.

ID.—REQUIREMENT OF SALE—SHOWING OF NECESSITY.—The insolvent law is distinct from the probate law in requiring that all of the property of the insolvent shall be sold and converted into money; and, in case of a petition for an order to sell the property of the in-

solvent at public sale, as distinguished from a private sale, no necessity need be shown to justify an order of sale thereof.

ID.—PUBLIC SALES—DIRECTIONS BY COURT—SALE EN MASSE—NOTICE.

The only requirement of the insolvent law in reference to public sales of the estate of the insolvent is that such sales shall be made "as ordered by the court"; and the court has power to direct that the property shall be sold together and not separately, and to direct in what paper and for what period notice of the sale shall be published.

ID.—JURISDICTION OF JUDGE PRESIDING IN ANOTHER COUNTY—RESUMPTION.

—A judge of the superior court of one county presiding in another county upon proper request, has jurisdiction to make an order for the sale of the property of an insolvent debtor, in such other county; and in the absence of a showing to the contrary, it must be presumed that he was requested to preside, either by the judge of the superior court of such county or by the governor in accordance with section 8 of article VI of the constitution.

APPEAL from an order of the Superior Court of Santa Cruz County for the sale of the property of an insolvent debtor. George H. Bahrs, Judge presiding.

The facts are stated in the opinion of the court.

Charles B. Younger, for Appellant.

Albert Dickerman, for Respondent.

VAN DYKE, J.—F. A. Hihn Company, a corporation, and a creditor of said insolvent corporation, appeals from the order of sale of the property of said insolvent debtor.

The first objection on the part of the appellant is that the petition of the assignee for the sale is not sufficient; that it does not allege that the property of the insolvent has been assigned to the petitioner; that it does not show a necessity for the sale of the property; and that the description of the property is insufficient.

The petition states that the petitioner is the duly appointed, qualified, and acting assignee of the estate of the insolvent corporation; that as such assignee he has taken possession of all the estate described in the petition, schedule, and inventory of said insolvent; that in order to pay the debts of said insolvent it is necessary to sell all of its estate vested in the petitioner as such assignee; that all of the per-

sonal property belonging to said estate, except a debt of five dollars due to said insolvent debtor from Peter C. Brown, is set out in full in the schedule and inventory attached to his petition on file in this court in said matter, and a full description of the real property of the insolvent asked to be sold is set out in the petition. It was not necessary to describe the personal property in detail. It was sufficient to refer to the schedule and inventory on file. By the adjudication in insolvency the property of the insolvent passed from the insolvent and comes under the control of the court. (*Rued v. Cooper*, 109 Cal. 682.) With the petition and this schedule and inventory before it, the court had everything belonging to the estate before it. The insolvent law requires the assignee to convert the estate, real and personal, into money as speedily as possible, and "from time to time sell at public auction all the estate, real and personal, vested in him as such assignee, and which shall come to his possession, and as ordered by the court." (Insolvent Law of March 26, 1895. secs. 25, 29; Stats. 1895, p. 131.) The provisions of law for the sale of property of an insolvent debtor are entirely different from those in reference to the sale of property belonging to the estate of a deceased person, or of a ward, and upon foreclosure or execution sales. In the case of an insolvent debtor, in the nature of things, and as required by the express provisions of the law, all property and effects must be sold and converted into money in order to pay the creditors of such insolvent, whereas, in the case of a probate estate or guardianship, only sufficient property to pay the debts and expenses can be sold. So, also, in reference to foreclosure and execution sales, only sufficient property should be sold to satisfy the judgment or decree; the authorities cited by appellant are mostly in reference to sales of this latter class, and have no application to the case of an insolvent estate. It is only where an application is made to sell at private sale that it is necessary to set forth in the petition the necessity for such sale. (Insolvent Law, sec. 29.) The petition in this case was sufficient.

Appellant also objects to the order of sale for the reason that the property was ordered to be sold together, and not separately, and that the order directed what paper the notice of sale should be published in, and for ten days only. The

only requirement of the insolvent law in reference to public sales is that such sales shall be made "as ordered by the court." The special directions referred to by appellant are in the case of private sales and the sale of perishable property. (See Insolvent Law, secs. 25, 29, 30.) There is nothing in the contention of the appellant that the judge purporting to make the order was without jurisdiction in the premises. It appears that the order of sale was made and signed by George H. Bahrs, one of the judges of the superior court of the city and county of San Francisco, at the time sitting in the place of Lucas F. Smith, judge of the superior court of Santa Cruz county, in which county the proceedings were pending. It is said by appellant that this court must take notice that there is but one judge of the superior court of Santa Cruz county, and that Judge Bahrs is not judge of said court. But this court must also take notice that "a judge of any superior court may hold a superior court in any county, at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty so to do." (Const., art VI, sec. 8.) Nothing appearing to the contrary, the court must also presume that this provision of the fundamental law was complied with, and that Judge Bahrs was legally holding court in Santa Cruz county at the time the order was made.

Order affirmed.

Garoutte, J., and Harrison, J., concurred.

[L. A. No. 807. Department Two.—November 30, 1900.]

GERRY TOWLE, Respondent, v. THOMAS M. MATH-
EUS et al., Appellants.

**ARREST—USE OF UNNECESSARY FORCE—LIABILITY OF OFFICER AND SURE-
TIES.**—An officer who, in making a lawful arrest, uses excessive
and unnecessary force, is liable upon his official bond for damages
thereby caused to the person arrested.

**ID.—CONSTRUCTION OF FINDING—"WILLFUL" SHOOTING BY DEPUTY—
"MALICE" NOT IMPORTED—"INTENTIONAL" ACT.**—A finding that a
deputy officer, in making the arrest, "willfully shot plaintiff in the
back," is not to be construed as importing that the deputy acted
"maliciously," and that his action was therefore extra-official, for
which the officer was not liable, but is to be construed as employ-
ing the term used in its ordinary sense, and importing that the dep-
uty "intentionally" or "willingly" shot the plaintiff.

APPEAL from a judgment of the Superior Court of Los
Angeles County. Waldo M. York, Judge.

The facts are stated in the opinion.

W. H. Savage, and Goodrich & McCutchen, for Appel-
lants.

An officer is not liable for the extraofficial acts or miscon-
duct of his deputies, as where the deputy goes outside the exe-
cution of his duty, or is impelled by some private motive or
malice of his own. (*State v. Moore*, 19 Mo. 369¹; *Mechem on*
Public Officers, secs. 797, 798.) The term "willful," as used
in statutes, imports an evil intent. (*Commonwealth v. Kneel-
land*, 20 Pick. 220; *Felton v. United States*, 96 U. S. 702;
Galvin v. Gualala Mill Co., 98 Cal. 270; *United States v.*
Britton, 107 U. S. 668.)

F. W. Allender, and Frazier M. Sallee, for Respondent.

No penal statute is here involved, but only the construction
of a finding, in which the words used are to be understood in
their ordinary sense, and not in any technical sense, where
the context does not require a technical sense. (Code Civ.

¹ 61 Am. Dec. 563.

Proc., sec. 16; *Weill v. Kenfield*, 54 Cal. 113; *People v. Eddy*, 43 Cal. 313²; *Appeal of Houghton*, 42 Cal. 35; *Benkert v. Benkert*, 32 Cal. 467, 471.) An officer is liable for the misconduct of his deputy, where he assumes to act under color and by virtue of his office. (5 Am. & Eng. Ency. of Law, 634, 635; Mechem on Public Officers, sec. 798; Pol. Code, sec. 959.) An officer is liable in damages on his bond for any unnecessary force used in making an arrest. (*Rischer v. Meeham*, 11 Ohio C. C. 403; *Clancy v. Kenworthy*, 74 Iowa, 740³; *Thomas v. Kinkead*, 55 Ark. 502⁴; *State v. Hunter*, 106 N. C. 796; *Topeka v. Boutwell*, 53 Kan. 20; *State v. Walford*, 11 Ind. App. 392.)

CHIPMAN, C.—Action against the constable of Wilmington township, Los Angeles county, and his bondsmen to recover damages for injuring the person of plaintiff while arresting him. The trial was by the court without a jury, and plaintiff had judgment, from which defendants appealed. The arrest was made in the town of San Pedro, and the court found that at the time plaintiff was “willfully and maliciously disturbing the peace and quiet of the neighborhood,” etc.; that in order “to stop his disturbance,” the constable, defendant Matheus and his deputy, one Mathews, seized hold of plaintiff and placed iron nippers or handcuffs on plaintiff’s wrists; that when they attempted to arrest plaintiff “he violently and with force resisted said arrest,” and in order to make the arrest the constable called upon the bystanders to assist him and his deputy, and several persons responded to the call and gave their assistance; “that the plaintiff struck said Matheus in the face with his fist, whereupon said Matheus [the constable] then violently struck plaintiff over the head with a pistol covered with a scabbard, thereby cutting plaintiff’s scalp and causing it to bleed profusely, and the said Mathews [the deputy] drew his pistol and willfully shot plaintiff in the back. That said Matheus and Mathews, assisted by other persons, then took plaintiff to the city jail.” The arrest was made for a breach of the peace committed in the sight of the officers and without a warrant, and at the time plaintiff was a stranger to the constable and his deputy, and whatever was done by the officers was “by virtue of and under color of their said of-

² 13 Am. Rep. 143.

⁴ 29 Am. St. Rep. 68.

³ 7 Am. St. Rep. 508.

fices." The court further found: "That while making said arrest the said Matheus, in striking said plaintiff over the head with his said pistol, and the said Mathews, in shooting said plaintiff in the back, used excessive force, and more force than was necessary to be used by them in overcoming plaintiff's said resistance while making said arrest, and in using such excessive and unnecessary force at said time and place, acted wrongfully and negligently." The findings then describe the nature of the wound inflicted by the pistol, which was severe, and disabled plaintiff from pursuing his occupation for some time. The court then finds "that by reason of the wrongful and negligent acts of defendant Matheus as such constable, and said Matheus, as such deputy constable, in using such excessive and unnecessary force in striking and shooting said plaintiff the condition of the bond mentioned in the complaint was broken," etc.

Appellants say in their brief: "It is conceded that an officer must not use any more force than is necessary to accomplish the arrest, and if the findings had simply been to the effect that Matheus and Mathews used excessive force, then we concede that this judgment should stand, but the findings went further, and are that the said Mathews drew his pistol and 'willfully' shot plaintiff in the back," and it is hence claimed that this act of the deputy was extraofficial, for which the officer is not liable. (Citing Mechem on Public Officers, secs. 797, 798.)

Appellants' contention rests upon the assumption that the word "willfully" in the findings was used with reference to its meaning in connection with penal statutes or as implying malice. It is so used in the most of the cases cited by appellants. We do not think that the findings, when considered together, sustain appellants' contention. The court meant no more than to say that the act of the deputy was intentional, but not malicious. In one of the findings the force used by the officer and his deputy was characterized as "excessive and unnecessary," and as "wrongfully and negligent." But there is nothing in the findings, when fairly interpreted, to indicate that, in the opinion of the trial court, the force used was maliciously exercised or with any wicked intent. The plaintiff was a stranger to both the officer and his deputy, was in the commission of a breach of the peace,

and when the arrest was attempted he resisted with force, even to the extent of assaulting the officer, and requiring the assistance of bystanders to overcome his resistance. It was during this encounter, as the findings show, that the deputy fired upon the plaintiff. The shooting was unnecessary, wrongful, and negligent as the court found, and it was also "willful" as found, but we do not think it was malicious or extraofficial, and we think the court so intended to be understood.

"Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding sections, are to be construed according to such peculiar and appropriate meaning or definition." (Code Civ. Proc., sec. 16.) But when technical words are used, they should be given their ordinary and popular meaning unless the context shows that they are used in a technical sense. (*Weill v. Kenfield*, 54 Cal. 111.) The word "willful" is not necessarily technical, nor has it acquired a peculiar meaning in law which is universally accepted. It is used with reference to desertion in the Civil Code, section 95, and in that connection signifies intentional, which is its ordinary signification, and does not imply any malice or wrong toward the other party (*Benkert v. Benkert*, 32 Cal. 468); and the same may be said of "willful neglect of the husband to provide for his wife the common necessities of life." (Civ. Code, sec. 105.)

"The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to." (Pen. Code, sec. 7.) We have no right to assume that the court used the word in any other sense than as the findings, considered as a whole, show that the court intended to use it; and it seems to us quite clear that the intention was to use the word in its ordinary sense.

We advise that the judgment be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Temple, J., McFarland, J., Henshaw, J.

[Sac. No. 683. Department Two.—November 30, 1900.]

W. A. WALLACE et al., Respondents, v. FARMERS'
DITCH COMPANY et al., Appellants.

RIPARIAN RIGHTS—STREAM AND BRANCH—DIFFERENCE OF LEVEL—MAINTENANCE OF DAM—FINDINGS OUTSIDE OF ISSUES.—In an action involving the relative riparian rights of the plaintiffs upon a main stream, and of the defendants upon a branch thereof, where the complaint alleged that the bed of the branch was three feet above the level of the stream, that defendants had lowered its bed to plaintiff's injury, and plaintiffs had restored the original level by means of a dam, for the threatened destruction of which an injunction was sought, and where the answer merely took issue upon the allegations of the complaint, findings as to the size, contour, roughness, grade, and velocity of the river, and as to the specific quantity of water plaintiffs are entitled to have flow past the head of the branch, are outside of the issues, and cannot support a judgment based thereon.

ID.—APPEAL—UNCERTAINTY OF FINDINGS AND JUDGMENT—MODIFICATION—REVERSAL—PARTIES NOT APPEALING.—Upon appeal from such judgment, where the findings outside of the issues and the judgment leave it uncertain at what height the dam may be maintained, and appear to indicate that it may be maintained at different heights, so as to secure the flow of a specified quantity of water to the plaintiffs, the judgment cannot be modified, but must be reversed as to the appellant, though it will not be disturbed as to the rights of parties not appealing.

ID.—RIGHTS OF RIPARIAN OWNERS UPON BRANCH.—The riparian owners of the land upon the branch of the stream are entitled to have their rights protected against the maintenance of the dam at its head at a greater height than is justly warranted.

ID.—EVIDENCE—IMMATERIAL DIVERSIONS.—Evidence of diversions above and below the head of the branch is not germane or material to the issue as to the right to maintain the dam at the head of the branch, and is properly rejected.

ID.—NATURAL FILLING OF BED OF STREAM.—Evidence of the natural filling of the bed of the main stream was properly confined to the head of the branch stream, and evidence of such filling at points three miles above and a mile and a quarter below the head of the branch was properly rejected.

APPEAL from a judgment of the Superior Court of Tulare County and from an order denying a new trial. J. R. Webb, Judge.

The facts are stated in the opinion of the court.

J. A. Hannah, and Alfred Daggett, for Appellants.

E. O. Larkins, William W. Cross, Bradley & Farnsworth, Maurice E. Power, and Power & Alford, for Respondents.

McFARLAND, J.—This is an appeal by two of the defendants, the Farmers' Ditch Company and George D. Bliss, from the judgment and from an order denying their motion for a new trial. The case involves certain water rights in the Kaweah river.

The Kaweah river is a natural watercourse which has its source in the Sierra Nevada mountains, and flows westerly into the San Joaquin valley and through Tulare county. At a certain point there is a diversion of the stream, and a part of the water runs at times out of the main river into a branch called Deep creek. Respondents are riparian owners and proprietors on the main river below the head of Deep creek, and the appellants are riparian owners and proprietors on Deep creek. The main river below the head of Deep creek is sometimes called Mill creek. It is averred in the complaint that the bed of Deep creek at the point where it leads out of the river was naturally "more than three feet higher than the bed of said Kaweah river, and the water flowing in said Kaweah river did not and could not flow into said Deep creek until it was more than three feet deep in the said river." It is further averred that before the commencement of the action appellants wrongfully cut and artificially lowered the bed of Deep creek so that it became at its head as low as, if not lower, than the bed of the river, and this caused nearly the whole of the water of the river which was accustomed to flow and of right ought to have flowed down said river to flow into said Deep creek. It is further averred that "for the purpose of restoring the bed of the channel of said Deep creek at its head to its former natural condition," so that the water would flow as it was accustomed, etc., the respondents constructed a dam along the bank of the river and across the head of Deep creek, "which said dam does not prevent any water from flowing into said Deep creek which formerly was accustomed and of right ought to flow therein." It is further averred that appellants threaten to, and if not restrained by

the court will, "tear out and remove said dam, and will thereby divert nearly the whole of the water of said river," etc. The prayer is that appellants be restrained by injunction from removing or in any way interfering with said dam. The appellants, by their answers and cross-complaints, deny that the bed of Deep creek is naturally any higher than the bed of the river, and deny that they have lowered the same; aver that respondents have wrongfully put in said dam and thereby wrongfully exclude from Deep creek the waters which would otherwise naturally flow therein; and pray for an injunction requiring respondents to remove the dam, and restraining them from putting in any dam or other obstruction at the head of Deep creek.

Upon these issues—which are the main ones in the case—the court found that prior to the alleged wrongful acts of the appellant the bed of the channel of Deep creek at the point where it leads out of the river, and for about one mile below said point, was two and one-half feet higher than the bed of the river; and that the appellants did enter upon the bed of Deep creek, and dug down and scraped out the same, and thereby caused the bed to be lowered to the level of the river, and thereby caused nearly the whole of the water of the river to flow down Deep creek, and prevented it from flowing down the river as it was accustomed theretofore naturally to flow.

The main finding of the court intended to declare and define the rights of the parties in the premises—finding 18, as amended—is as follows:

"That for the purpose of restoring the bed of the channel of said Deep creek at its head to its former natural condition, so that the waters would flow in said Kaweah river as it had been accustomed to and of right ought to flow therein, and for the purpose of causing the waters of said Kaweah river to flow to and in said Mill creek as it had been accustomed to and of right ought to flow therein, the plaintiff did, on the nineteenth day of April, 1896, construct a dam in and across the head of said Deep creek, but said dam should be only of sufficient height to allow a stream of water two and one-half feet deep and twenty feet wide on the bottom and thirty-five feet wide on the top, and on a grade of two feet in four thousand three hundred and eighty-nine feet using coefficient C—60 in the formula Velocity—CVrs, to flow past the head

of said Deep creek and down the Kaweah river before any shall flow down said Deep creek from said Kaweah river, and the crest of said dam should be lowered to two and one-half feet high on the said Kaweah side of said rock dam for a distance of seventy-five feet, but not to be lowered so as to allow any water to pass into Deep creek until a stream of water two and one-half feet deep and twenty-five feet wide on the bottom and thirty-five feet wide on the top, and on a grade of two feet in a distance of four thousand five hundred and eighty-nine feet using coefficient C—60 in a formula Velocity— $CV^{.65}$, shall pass the head of Deep creek and down the channel of Kaweah river below the head of Deep creek; and at all times plaintiff may hereafter maintain said dam at a height sufficient to allow said last-named quantity of water to flow past the head of Deep creek and down the Kaweah river before any shall be allowed to pass into the head and down said Deep creek." The conclusion of law upon the finding is that plaintiffs are entitled to have and maintain in the head of Deep creek "the rock dam that is now therein to the height or depth of two and one-half feet, of sufficient height to allow to pass down the Kaweah river and pass the head of Deep creek a stream of water"—and then follows the amount of water to be measured by the mathematical formula as before given in finding 18. In subdivision 1 of the judgment it is decreed "that plaintiffs are entitled to have and maintain in the head of Deep creek the rock dam in controversy in this action to the height or depth of two and one-half feet, of sufficient height and so located as to allow to pass down the Kaweah river and past the head of Deep creek"—and then follows a description of a stream of water and the mathematical formula before stated; and by subdivision 2 of the judgment it is decreed that plaintiffs have a perpetual injunction restraining defendants "from tearing out or removing said dam, or any part thereof, built in the bed of said Deep creek as hereinbefore found and allowed in said findings as above mentioned."

There was evidence sufficient to justify the findings that the bed of Deep creek is naturally higher than the bed of the river, and that appellants wrongfully lowered the same. But appellants contend that the above-mentioned findings, so

far as they undertake to establish the size, contour, roughness, grade, velocity, etc., of the river and the specific quantity of water which respondents are uniformly entitled to have flow down the same past the head of Deep creek, are outside the issues and unwarranted by the allegations of the complaint, and that the judgment, being founded on these findings, is for the same reason unwarranted and invalid; and, furthermore, that under any view the findings on these points are too uncertain to sustain the judgment, and that the judgment is invalid for want of certainty as to the height at which respondents may maintain the dam; and we are of opinion that these contentions must be sustained.

The averments of the complaint are simply that the bed of Deep creek at its head is naturally more than three feet higher than the bed of the river at that point, so that, of course, no water would naturally flow into Deep creek until it was more than three feet deep in the river; that appellants wrongfully lowered the bed of Deep creek to the level of the natural bed of the river, so that the water at any stage would flow into Deep creek; that respondents had erected the dam so as to restore the natural conditions, and that appellants threatened to remove the same. There are no averments as to any specific quantity of water to which respondents are entitled, or as to the width of the river, or its velocity, grade, etc.; and the purpose of the action, as set forth in the complaint, is merely to have the two streams restored to and maintained in their natural relative conditions, so that the waters of the river shall flow in their natural and accustomed manner past the head of Deep creek. Indeed, respondents seem to have always taken this view, for the record shows that, in objecting to certain evidence, they said: "This is a suit to determine the height of the bank of the Kaweah river at the head of Deep creek, and any issue in regard to water should not be taken in consideration of this case"; and in their brief they say "this is not an action to determine the quantity of water to which the parties are entitled." It is no answer to this objection to say that the purpose of that part of the judgment which relates to the quantity of water, etc., was merely to fix the height of the dam; for, even if that construction could be given to it, the character and effect of the judgment would not be thereby changed. But the various

provisions in the findings and judgment about the quantity of water and the methods of calculating it constitute the principal thing, and the height of the dam is the incident. It is true that two and a half feet is mentioned once or twice as the height of the dam to be maintained by respondents; but it is found that "said dam should be only of sufficient height to allow a stream of water"—described as aforesaid—to pass down the river, and that "at all times plaintiff may hereafter maintain said dam at a height sufficient to allow said last-named quantity of water to flow past the head of Deep creek and down the Kaweah river before any shall be allowed to pass into the head and down Deep creek." The height of the dam is not fixed, but is to be regulated by the amount of the water, and may be kept high enough—whether two and one-half feet high or higher—to allow a volume of water, to be calculated as stated, to pass down the river. No provisions are made for any natural change of conditions—as, for instance, the elevation of the bed of the river by natural causes—but the two streams appear to be treated as if they were artificial ditches instead of natural watercourses. It is found that "at all times plaintiffs may hereafter" maintain the dam high enough to satisfy the requirements of the findings concerning the water. The judgment follows these findings, and as the findings and the parts of the judgment which follow them are outside the issues and unwarranted by the complaint, it is unnecessary to notice appellants' contention that those parts of the findings, including the mathematical expression, which attempt to deal with the water, are themselves so uncertain that it cannot be determined therefrom what volume or quantity of water is directed to be carried past the head of Deep creek.

But respondents contend that if the findings and judgment touching the volume, etc., of the water are unwarranted, they may be entirely disregarded and the findings and judgment will still be sufficient and complete. This might be so if the findings and judgment fixed and decreed with any certainty the actual height at which the dam may be maintained; but they do not. It is found that the height of the present dam is more than two and one-half feet, but how much more is not found. If the actual height of the present dam had been found, the court, perhaps, might have

properly decreed that it be lowered to the extent of the difference between its present height and the height of two and one-half feet; or, perhaps, a permanent monument could have been designated which would definitely fix the height to which the dam might be maintained; or, if the base of the dam from which the two and one-half feet should be measured had been fixed, there might have been some certainty in the judgment. But in the first place, as before stated, there is not even any general provision that the dam shall be only two and one-half feet high, for its height is to fluctuate to meet the requirements of the volume of water; and, in the second place, neither the bottom nor the top of the two and one-half feet is given. It was apparent from the evidence that at the time of the wrongs alleged to have been committed by appellant the bed of the river had been elevated from natural causes, and there is no finding as to the height of the bed at that time, and no finding as to the level from which the two and one-half feet is to be measured. It would be impossible for the parties to know what their rights are under the judgment; and the controversies which would inevitably ensue could not be determined by any data provided by the decree. The findings therefore, are too uncertain to support the judgment, and the judgment is itself invalid for uncertainty. As to the appellants, the judgment and order appealed from must be reversed.

We do not think that any of the other contentions of appellants can be maintained, unless it be the contention of Bliss that there should have been a finding as to his ownership of land on Deep creek, and that there ought to have been an express decree giving him an injunction restraining respondents from maintaining the dam at any greater height than they are entitled to maintain it. These matters do not seem to have been very important under the findings of the court; but if on another trial the court should find substantially as above, there ought to be a finding as to Bliss' ownership of the land set forth in his cross-complaint, and while under a judgment in form like the present one he would probably be entitled to contempt proceedings if respondents should keep their dam too high, it would be well enough to expressly decree an injunction to meet such contingency. We do not think that the court erred in rejecting evidence

offered by Bliss as to alleged diversions of water by respondents above the head of Deep creek, or in rejecting evidence offered by appellants as to alleged diversions of water from the river below the head of Deep creek by the Tulare irrigation district; as to the former offer, the alleged diversion of water is not germane to this action, the purpose of which is merely to restore the natural conditions of the two natural watercourses at the head of Deep creek; and as to the latter offer, it is sufficient to say that the alleged diversion of water from the river below the head of Deep creek was entirely irrelevant and immaterial. Nor do we think that any error was committed in rejecting the offered testimony of the witness Jordan to the effect that the bed of the river had filled up at points three miles above and a mile and a quarter below the head of Deep creek; no evidence as to the filling of the bed of the river at the head of Deep creek was rejected. There was sufficient evidence to support the finding that respondents had not widened or lowered the channel of the river. We think that the foregoing are all the points made by appellants which call for notice.

In the judgment there is an adjudication of certain rights to the waters of Deep creek as between the defendant the Tulare Irrigation Company on the one side, and the defendants Swall and James and Cora Morton on the other; and as this adjudication does not affect the other parties, and is not appealed from, that part of the judgment will not be disturbed.

As a great deal of evidence was introduced in the court below which evidently made the litigation there quite expensive, it is unfortunate that we cannot order the judgment to be modified and thus avoid the necessity of a new trial; but although we have endeavored to reach that result, we have not been able to discover anything in the findings as they now stand that would warrant us in directing a new and different judgment. But although the parties will necessarily have the right to litigate anew the issues as to how much, if any, the appellants have wrongfully lowered the bed of Deep creek, what are the relative heights of the beds of the two streams, and how high the dam should be maintained, if at all, in order to restore the natural conditions, still the evidence on those points might be confined within moderate bounds, and the parties, if they desire to save expense, could

by stipulation introduce much of the evidence given at the former trial without recalling the witnesses. Of course, some additional evidence will be necessary to enable the court, if it again finds on these issues adversely to appellants, to fix the height of the dam with exactness and certainty; but whatever the consequences may be, we are compelled, under our views of the case, to reverse the judgment and order denying a new trial, so far as they affect the appellants herein.

The judgment, so far as it is against the appellants, is reversed; the order denying their motion for a new trial is also reversed, and the court below is directed to retry the case as to appellants in accordance with the views expressed in this opinion.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 1717. Department One.—Dec. 1, 1900.]

JOHN F. BUSEY, Appellant, v. J. B. MORAGA et al., Respondents.

MISTAKE IN MORTGAGE, DECREE, AND SHERIFF'S DEED—REFORMATION IN EQUITY—REMEDY BY MOTION.—Where there is a mistake in the description of property in a mortgage, and the same mistake has been carried into the decree of foreclosure and the sheriff's deed, conceding that relief might have been granted by motion in the original case, a court of equity has jurisdiction to go back to the original transaction and to reform the mortgage, as well as the decree and deed, so as to make them conform to the original intention of the parties.

ID.—POWER OF EQUITY TO ORDER—RESALE.—If justice requires it, it is in the power of a court of equity, after reforming the mortgage and the decree and order of sale, to direct a new notice and sale of the property.

ID.—LOCATION OF TOWN LOTS—ERROR IN BLOCK—MUTUAL MISTAKE—FINDING AGAINST EVIDENCE.—A finding made by the court that there was no mutual mistake of the parties, but only a mistake of the mortgagor in copying from the description in a first mortgage, which showed an erroneous location of town lots owned by the mortgagors as being in block "H," whereas the only lots owned by them

were in block "K," held to be against the evidence, which showed that the mortgagors intended to mortgage the town lots owned by them, and believed that they were included in plaintiff's mortgage and decree of foreclosure, as well as in the first mortgage, which was also foreclosed in the same action, and that, so believing, the mortgagors made default and consented to the foreclosure, and did not discover the mistake in the description until after the sale under the foreclosure.

ID.—ESTOPPEL OF MORTGAGORS.—The mortgagors are estopped by the mortgage from denying that they executed it; and where it appears that they consented to a decree of foreclosure on the understanding that both of the mortgages foreclosed included the property owned by them, they are estopped from denying that there was a mistake on their part in the description of the property, and from asserting that they gave a mortgage upon property which they did not own.

APPEAL from a judgment of the Superior Court of Contra Costa County and from an order denying a new trial. Joseph P. Jones, Judge.

The facts are stated in the opinion.

R. H. Latimer, and W. S. Tinning, for Appellant.

William S. Wells, for Respondents.

HAYNES, C.—Appeal by the plaintiff from the judgment and an order denying his motion for a new trial.

Defendants were the owners of three several tracts of farming land in Contra Costa county, and also of lots 7, 13, and 14, in block K, in the town of Concord, in said county, which lots are also referred to in the record as "the Neff property." Prior to March 31, 1895, defendants mortgaged two of the tracts of farming land, and three town lots in said Concord, described in mortgage as "lots 7, 13, and 14, in block H," to Andrew Gehringer (since deceased), and the third tract of farming land to Thomas and Mary A. Moore. On March 31, 1895, the defendants, being indebted to plaintiff in the sum of one thousand and fifty dollars and fifty cents, executed to him a mortgage upon all three of said tracts of farming land, and also upon town lots described as in the Gehringer mortgage.

In April, 1897, none of said mortgages having been paid or released, the plaintiff brought suit to foreclose his said mortgage, and made the executors of Gehringer and the

Moore parties defendant, and all said mortgages were foreclosed, the decree directing that the several parcels of land be sold separately. Said town lots were described in the decree as lots 7, 13, and 14, in block H. At a sale of said several parcels of land under said decree, the executors of Gehringer, as individuals, became the purchasers of the two tracts of farming land described in his mortgage, for the amount found due the estate, the Moores purchased the tract described in their mortgage for the amounts due to them, and the plaintiff became the purchaser of the town lots. Said sales were made on February 15, 1897. In the decree, notice of sale, and certificate of sale, said town lots were described as in the mortgage. The alleged error in the description of the town lots was discovered about two months after the sale, and this action was brought on April 23, 1897, to reform the mortgage, decree and certificate of sale, so as to describe said lots as being in block K instead of block H.

The complaint alleged that there was a mutual mistake of the parties to plaintiff's mortgage in the description of the lots.

Defendants demurred to the complaint and the demurrer was overruled. Respondents contend that it should have been sustained, because plaintiff had a remedy by motion in the original case, and that therefore an action to reform the proceedings will not lie.

If it be conceded that plaintiff might have had full relief upon motion under the provisions of the Code of Civil Procedure, it does not follow that an equitable action cannot be maintained for the same purpose. In *Quivey v. Baker*, 37 Cal. 465, it was held that "if there was a mistake in the mortgage in the description of the property, and the same mistake exists in the decree and the sheriff's deed, equity will go back to the original transaction and reform all three so as to make them conform to the original intention of the parties." (See, also, *Donald v. Beals*, 57 Cal. 399, 405, where *Quivey v. Baker*, *supra*, is cited.)

It is also urged as an objection to the remedy by independent action that the mortgagor is deprived of his property by a sale without notice, the property having been described as certain lots in block H; but it is in the power of a court of equity, after having reformed the mortgage and pro-

ceedings down to the sale, to direct a new notice and sale if justice requires it.

The defendants answered the complaint, the cause was tried, and the court found for the defendants. Appellant attacks certain of the findings as not justified by the evidence. The eighth finding is: "That there was not a mutual mistake of the defendants, the parties making said mortgage; but there was a mistake made by the plaintiff in drawing up said mortgage, in this, that he intended to include in the mortgage the lots 7, 13, and 14, in block K of said town of Concord. The understanding was not that the defendants Moragas were mortgaging said lots in block K."

In the ninth finding it is said that plaintiff, in preparing his mortgage, copied the description of the lots from the Gehringer mortgage in which the town lots were described as being in block H, but the mortgagors intended to mortgage to Gehringer lots 7, 13, and 14, in block K.

The eleventh finding is as follows: "That the said plaintiff, John F. Busey, supposed the said Gehringer mortgage contained a correct description of said lots, as did also the defendants Moragas."

Appellant contends that said eighth finding is not justified by the evidence, and this contention I think must be sustained.

Indeed, the probative facts stated in the ninth and eleventh findings, and as to which the evidence is not conflicting, would seem to demonstrate that the ultimate fact stated in the eighth finding that there was not a mutual mistake in the description of the lots could not be justified by the evidence; for if in making the Gehringer mortgage in which the lots were described as being in block H defendants understood and believed they were mortgaging the lots which were in fact in block K, it would be the natural and reasonable inference that where town lots were described in a subsequent mortgage in identically the same words and figures that the same lots were intended, and especially where the mortgagors did not own any lots in block H, but did own lots bearing the same numbers in block K; and the evidence showed without conflict that defendants neither owned nor claimed any other lots in said town than 7, 13, and 14 in block K, and that said lots were commonly designated as the "Neff property," upon which Dr. Neff then, and for several years before,

resided. Mr. Moraga testified that at the time the mortgage was executed he asked the plaintiff whether the Neff property was in the mortgage, and that plaintiff told him it was not; and the plaintiff testified that he told him it was, and that Moraga wanted to sell the lots to him. But Mr. Moraga further testified as follows: "I found out the Neff property was in the Gehringer mortgage when the foreclosure suit was commenced. I told Mr. Wells at that time the Gehringer mortgage contained the Neff property, and I understood at the time the Gehringer mortgage was foreclosed that it was foreclosed upon the Neff property. I also found out that the plaintiff's mortgage contained the Neff property when the plaintiff foreclosed his mortgage, and I understood that plaintiff and Gehringer both foreclosed on the Neff property. I found out first that the Neff property was in the plaintiff's and Gehringer's mortgages when the papers were served upon me in the foreclosure suit. Mr. Wells [defendant's attorney] read the papers to me and told me the Neff property was contained in them, and I understood at the time of the foreclosure suit of plaintiff's mortgage and Gehringer's mortgage that both mortgages contained the Neff property.

The record also shows that upon the hearing of the foreclosure case the defendants Moraga and wife appeared by counsel and admitted the execution of both plaintiff's and Gehringer's mortgages, and permitted their defaults to be entered.

In view of the defendant's testimony, it is clear, beyond controversy, that they understood that all mortgages which covered town property was upon the lots spoken of as the "Neff property," and they are estopped by the judgment to deny that they executed the mortgage. The mortgage was read to him by Mr. Wells when the papers were served, and he then knew how the lots were described, and he testified that he "understood at the time of the foreclosure suit of plaintiff's mortgage and Gehringer's mortgage that both mortgages contain the Neff property." With that understanding he made no defense and had his default entered. It is clear that from the time Mr. Wells read the mortgage to him that he was laboring under a mistake as to the description of the property upon which Dr. Neff resided, and, hav-

ing consented to a decree of foreclosure upon the understanding that it included the Neff property, he is estopped from saying that there was no mistake on his part, and that he gave a mortgage on property which he knew was not his; and the fact that before plaintiff's mortgage was executed he had made a mortgage to Gehringer by the same description intending, and understanding, as he admits and the court finds, that the property mortgaged was the Neff property, would, to say the least, render it highly improbable that when he made the mortgage to plaintiff by the same description he intended a different property, especially when he does not claim to have known until after the foreclosure sale that the Neff property was not in block H.

The findings that there was not a mutual mistake in the description of the lots, and that the understanding was not that the defendants were mortgaging the lots in block K, are not justified by the evidence.

I advise that the judgment and order appealed from should be reversed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

Garoutte, J., Harrison, J., Van Dyke, J.

[Crim. No. 650. In Bank.—December, 3, 1900.]

THE PEOPLE, Respondent, v. JUSTIN A. BROWN, Appellant.

CRIMINAL LAW—HOMICIDE—SELF-DEFENSE—SUPPORT OF VERDICT.—A verdict of guilty of murder will not be disturbed upon appeal, notwithstanding doubt thrown upon the testimony of the only eyewitness to the homicide, which, if believed by the jury, would support the verdict, and notwithstanding the corroboration of testimony of the defendant that he acted in self-defense. The truth or falsity of the testimony was matter for the jury to pass upon.

ID.—EVIDENCE—LEADING QUESTIONS—DISCRETION OF TRIAL COURT.—

The trial court has discretion to allow leading questions to be addressed to a witness for the prosecution in his examination in chief, and its discretion will not be interfered with upon appeal, except in a clear case of abuse.

ID.—HARMLESS RULING—PRELIMINARY QUESTIONS—DYING DECLARA-

TIONS.—The allowance of preliminary questions asked of a witness with a view to the introduction of the dying declarations of the deceased is harmless, and could not prejudice the defendant, where the dying declarations were not offered in evidence.

ID.—DECLARATION OF DECEASED—REFUSAL TO STRIKE OUT.—

The refusal of the court to strike out evidence of a declaration of the deceased, made a short time after the shooting, that he was "shot to kill," cannot be prejudicial where it was conceded that defendant fired the fatal shot.

ID.—MOTIVE—DECLARATIONS OF DEFENDANT—INTIMACY WITH WIFE OF DECEASED.—

For the purpose of proving motive for the murder of the deceased, evidence of the declarations of the defendant tending to show intimate friendship or meretricious relations between him and the wife of the deceased is competent; and the fact that the declarations were of a vague and general character goes to their weight, and not to their admissibility.

ID.—EVIDENCE OF MOTIVE MATERIAL—PLEA OF SELF-DEFENSE.—

Evidence tending to show a motive for the killing is as material for the state, where the defendant claims that he acted in self-defense, as where the killing is denied.

ID.—INSTRUCTIONS AS TO DYING DECLARATIONS.—

Abstract instructions as to dying declarations, where none were introduced in evidence, are not ground for reversal; and the refusal to give instructions requested relating to that subject is not erroneous.

ID.—INAPPLICABLE INSTRUCTIONS.—

Instructions having no application to the facts of the case are properly disallowed.

APPEAL from a judgment of the Superior Court of Kern County and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Alvin Fay, and J. W. P. Laird, for Appellant.

Tirey L. Ford, Attorney General, and C. N. Post, Assistant Attorney General, for Respondent.

GAROUTTE, J.—Defendant has been convicted of the crime of murder and sentenced to life imprisonment. He now attacks the evidence as not being sufficient to support

the verdict. The killing is conceded, and self-defense was the plea at the trial.

There was bad blood between these two men, and communicated threats of bodily harm had been made by both a short time prior to the homicide. The single eyewitness to the tragedy, a boy of twenty years of age, testified to facts which, if true, show the defendant to be guilty of murder. The defendant testified that the deceased, at the time the fatal shot was fired, was advancing upon him in a threatening manner with an uplifted board in his hand, and that the shooting was necessary to save his own life. The location of the deadly wound upon the body tends strongly to corroborate the testimony of defendant as to the particular circumstances under which the fatal shot was fired. Again, some doubt is thrown upon the truthfulness of the testimony of the eyewitness by reason of the fact that he made many statements prior to the trial to various parties in detailing the circumstances of the affray, which were in conflict with his testimony. But after considering all these matters this court can only say that the truth or falsity of his evidence was essentially a matter for the jury to pass upon. If his evidence were true, the defendant was guilty of murder, and evidently the jury believed his testimony. Under principles of law long settled in this state, we cannot disturb the verdict upon the ground that the evidence is too weak to support it.

Various objections are made to the rulings of the court upon the admission of evidence, and we will notice the more important ones. Many of these objections are made to matters of evidence which in no possible way bore upon defendant's guilt, and had no tendency whatever to prejudice him in the trial of his case.

It is insisted that the court abused its discretion in allowing leading questions to be asked the witness Bennett. Some of the questions to which this objection is made are not leading, as for example, "Did he have anything in his hand?" In view of the fact that Bennett was the principal witness for the prosecution, the court might well have restricted the manner of the examination within narrower limits. At the same time, it is only in very exceptional cases that we will declare the trial court to have abused its discretion in allowing

an attorney to ask leading questions. The motives for the action of the trial court in matters of this kind are often of the character that the printed record brought before us but poorly discloses, and for this reason alone a wide range is given it in governing the conduct of attorneys in the examination of witnesses. Upon this point we cannot say that the court abused its discretion. The questions asked the witness Hitchcock all went to the establishment of a foundation upon which to base the introduction of a dying declaration. Inasmuch as the dying declaration was not thereafter introduced in evidence, objections to the questions addressed to him need not be considered. For the evidence given was merely preliminary, and in no way prejudiced defendant.

The witness Hitchcock testified that he saw deceased a very short time subsequent to the shooting, and that the deceased said to him, "I am shot to kill." Even conceding this evidence to be inadmissible hearsay, still no prejudicial error was committed in refusing a motion to strike it from the record. For it was conceded that defendant fired the fatal shot, and certainly that is as far as the declaration of the wounded man went.

Declarations of the defendant were introduced in evidence, which tended to show an intimate friendship existing between him and the wife of deceased. This evidence was of a very vague and general character, but objections upon this ground go to its weight rather than to its admissibility. For the purpose of proving motive for the murder of a husband, meretricious relations existing between a defendant and the dead man's wife may be shown, and it is said in *People v. Stout*, 4 Park. C. C. 128: "Whatever fact tends legitimately and fairly, according to the ordinary operation of the human mind and the ordinary principle of human conduct, to show motive, may properly be given in evidence, in proof of any assumed motive for the commission of crime. If the prisoner and Mrs. Littles had not been brother and sister, so that they could not intermarry, no doubt, I think, would have existed on the point. In such case I think it would have been quite apparent that a sufficient motive would have existed in the

case, and that it was proper to show a criminal intimacy between them. It would have been apparent in such case that they might have a motive to get rid of the husband, that they might more safely continue their criminal intercourse." (See, also, *Pierson v. People*, 79 N. Y. 424¹; *State v. Larkin*, 11 Nev. 328.) While the cases cited are those where the identity of the party who did the killing is a contested fact, still we see no difference in the application of the principle of law here invoked. Where the claim of the defendant upon trial for murder is that the killing was done in self-defense, then a motive for the murder is a circumstance as directly material to establish the case for the state as where the killing by a defendant is itself denied.

Complaint is made that the court committed error in modifying a certain instruction bearing upon the law applicable to dying declarations. We have searched the large record in this case with great care, and find no dying declarations of the deceased to have been introduced before the jury. And for this reason the law given to the jury upon the point was merely abstract, and it is evident upon its face availed nothing either for or against the defendant.

There being no dying declarations of deceased introduced before the jury, the court was entirely justified in refusing to give the instruction asked bearing upon a written dying declaration claimed by defendant to have been in the possession of the prosecution; and which they refrained from introducing in evidence. No oral declaration of deceased being introduced in evidence, the principle sought to be invoked that, when weaker evidence is introduced by a party where stronger evidence is in his possession, the evidence introduced should be viewed with distrust, can have no possible application to the facts of this case. The charge of the court as a whole appears to be full and fair, and no substantial objection to it presents itself.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., Harrison, J., McFarland, J., Temple, J., and Henshaw, J., concurred.

¹ 35 Am. Rep. 524.

[S. F. No. 2545. In Bank.—December 3, 1900.]

CAROLINE CAMENZIND, Appellant, v. JOHN KAMPFEN, Respondent.

APPEAL—STIPULATION FOR DISMISSAL—ABSENCE OF TRANSCRIPT—CLERK'S CERTIFICATE.—In the absence of the transcript upon appeal disclosing who are the attorneys of record, an appeal will not be dismissed upon a mere stipulation of attorneys, without a certificate of the clerk, under seal of the court, setting forth the matters required by rule VI of this court, and also the date of the entry of the order or judgment appealed from.

MOTION to dismiss an appeal from the judgment of the Superior Court of Sacramento County. Matt. F. Johnson, Judge.

The facts are stated in the opinion.

Holl & Dunn, for Appellant.

Devlin & Devlin, for Respondent.

THE COURT.—A motion has been made to dismiss the appeal from the judgment in the above-entitled action, based upon a stipulation signed by certain attorneys of this court, representing themselves as attorneys respectively for the appellant and respondent. No transcript on appeal has been filed, nor has the moving party presented any certificate from the clerk of the superior court from which it can be determined whether the appeal has been taken, or who are the attorneys therein for the respective parties.

Subdivision 2 of rule VI of this court provides that, on a motion to dismiss an appeal on any other ground than the failure to file the transcript within the prescribed time, the moving papers shall consist of the certificate of the clerk below setting forth certain matters mentioned in the preceding **subdivision of the rule, among which are** "the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears." While we have no reason to question the authority of the attorneys who have signed the above-named stipulation, we are

unwilling to establish a precedent by which an order for the dismissal of an appeal may be granted upon the application of persons not authorized to represent the parties to the appeal. In analogy to the practice embodied in the above rule, it must be held that on a motion to dismiss an appeal upon a stipulation of the parties thereto, when no transcript of the record has been filed herein, there must be presented in addition to the stipulation, a certificate of the clerk below, under seal of the court, setting forth the matters aforesaid, and also the date of the entry of the order or judgment appealed from.

The motion to dismiss the appeal is denied without prejudice to its removal upon the presentation of the certificate above indicated.

[S. F. No. 1380. In Bank.—December 6, 1900.]

GEORGE E. WHITE, Plaintiff, v. FRANKIE WHITE,
Respondent. J. S. ROHRBOUGH, Appellant.

DIVORCE—ALIMONY—MONEY JUDGMENT—EXECUTION.—A final decree of divorce granted to the wife containing judgment in her favor for permanent alimony in a single sum of money can only be regarded as an ordinary money judgment, to be enforced by writ of execution against the property of the husband.

ID.—RECEIVER APPOINTED PENDENTE LITE—CESSATION OF FUNCTIONS.—The functions of a receiver appointed pending an action for divorce, who took possession of no property before the judgment, terminated with the entry of the judgment.

ID.—CONTINUANCE OF RECEIVER AFTER JUDGMENT—JURISDICTION—VOID SALE AND DEED—WRIT OF ASSISTANCE.—The court had no jurisdiction, after the entry of the money judgment in such action, to continue the receiver for the purpose of enforcing the judgment; and a sale made by such receiver of the property of the husband, and a deed thereof made by him to the wife, are void and cannot justify a writ of assistance to the wife as purchaser.

ID.—CONSTRUCTION OF CODE—RECEIVER TO ENFORCE JUDGMENT.—The power given under subdivision 3 of section 564 of the Code of Civil Procedure to appoint a receiver, "after judgment, to carry the judgment into effect," is to be construed as applying only to cases

where the judgment affects specific property, and not as applicable to the case of an ordinary judgment for money, which may be enforced by execution.

ID.—CONCLUSIVENESS OF FINAL JUDGMENT—POWER NOT RESERVED.—A final judgment in an action for divorce, in which no power is reserved to render any further relief, is conclusive of the rights of the parties, as to the relief granted, as well as to the relief withheld. The court, in such case, is without jurisdiction to render any other or further judgment or relief in the action.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a writ of assistance. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

R. R. Bigelow, and A. A. Sanderson, for Appellant.

Henry E. Highton, William T. Baggett, and Walter H. Linforth, for Respondent.

VAN DYKE, J.—Appeal by the defendant Rohrbough from an order made on the application of the defendant, Frankie White, directing the issue of a writ of assistance. The case, stripped of immaterial circumstances, is this:

In a suit brought by the plaintiff against the defendant, Mrs. White—in which she had filed a cross-complaint—an interlocutory judgment was entered in her favor for divorce; and afterward, February 9, 1895, a final judgment for one hundred thousand dollars.

A receiver had been previously appointed to take charge of plaintiff's property, though in fact he had not taken any of it into possession. By the final judgment the receivership was continued with authority and direction to the receiver to prosecute suits and "take any and all legal measures and proceedings to enforce and secure the collection of the unpaid monthly allowance theretofore awarded, etc., and also the said sum of one hundred thousand dollars awarded (to the defendant) by said final decree."

Afterward, April 12, 1895, an order was made directing the receiver to sell property of plaintiff, including the lands now in question. Under this order the property was sold by the receiver to Mrs. White, to whom, after confirmation by the court, it was conveyed August 13, 1896. Subsequently,

she applied to the court for a writ of assistance to obtain possession of the land, and thereupon the order appealed from was made. At the time of the sale by the receiver the appellant Rohrbough was in possession of the lands in question under leases from the plaintiff, which expired pending the application for the writ of assistance.

The question involved is as to the jurisdiction of the court to make the order of sale of July 17, 1895; and we are of the opinion that this cannot be sustained.

The judgment in the case is not in any way affected by the provision as to the receiver. The receiver had not taken possession of any property; and the object of his original appointment, and the functions originally vested in him, terminated with the entry of the judgment. Any new duties conferred upon him by the judgment were in excess of the jurisdiction of the court, whose power to appoint a receiver exists only in the cases prescribed by the Code of Civil Procedure, section 564—of which this is not one. (*French Bank Case*, 53 Cal. 495.) The power under subdivision 3 (a new provision of the code) to appoint a receiver “after judgment to carry the judgment into effect,” applies only to cases where the judgment affects specific property—as in *Guy v. Ide*, 6 Cal. 101¹; *Hill v. Taylor*, 22 Cal. 191, and other cases cited in the annotated Code of Civil Procedure, section 564. The provision has no application to a simple money judgment; in such case the writ of execution furnishes an amply sufficient remedy, and is the only means provided. (Code Civ. Proc., secs. 682, 684.) The judgment here can only be regarded as an ordinary money judgment.

The judgment rendered was a final adjudication of the rights of the parties, and was conclusive not only as to the relief granted but as to the relief denied or withheld. (Code Civ. Proc., sec. 1908.) Upon its entry the jurisdiction of the court over the subject matter of the suit and the parties was exhausted, unless preserved in the mode authorized by statute. “By section 1049 of the Code of Civil Procedure, the cause had then ceased to be pending in the court, and the court was without jurisdiction to render any further judgment therein.” (*Bracket v. Banegas*, 99 Cal. 627; *Carpentier*

¹ 65 Am. Dec. 490.

v. Hart, 5 Cal. 406; *Bell v. Thompson*, 19 Cal. 706; 2 notes to California Reports, 130; Freeman on Judgments, secs. 141, 142; 1 Black on Judgments, sec. 306.) After final judgment any further judgment, or order materially varying the judgment, is a mere nullity. (*Barry v. Superior Court*, 91 Cal. 486; *In re Barry*, 94 Cal. 562; *Hubbard v. Moss*, 65 Mo. 647; *Ross v. Ross*, 83 Mo. 100.)

Doubtless the court may in its judgment provide for further action in order to furnish complete relief. But in such cases the judgment, as to such matters, is not final. Here there was no provision of the kind, and the judgment was final as to all matters involved. The order complained of was not designed to carry into effect the judgment rendered, but is in effect a new adjudication in the nature of a decree of foreclosure depriving the plaintiff of property held by him under constitutional guaranties, and of which he cannot be deprived without due process of law.

The order appealed from is reversed and the cause remanded, with directions to dismiss the proceeding.

Temple, J., Harrison, J., McFarland, J., Henshaw, J., Garoutte, J., and Beatty, C. J., concurred.

Rehearing denied.

[Crim. No. 661. Department One.—December 7, 1900.]

THE PEOPLE, Respondent, v. W. J. GOLDSWORTHY,
Appellant.

CRIMINAL LAW—BURGLARY—INTENT TO COMMIT ARSON—INFORMATION.

—An information for burglary charging that the defendant entered the basement of a certain store "with intent to commit arson" sufficiently charges the offense, and need not state the facts constituting the crime of arson. It is sufficient to allege an entry into a building, room, or apartment, with intent to commit a specific felony.

Id.—MOTIVE FOR ARSON—INSURANCE POLICIES ON DEFENDANT'S PROPERTY—PAROL EVIDENCE.—In order to establish a motive for the intent of the defendant to commit arson, the fact may be shown that

he was engaged in a general merchandise business in the adjoining building, and that his goods therein were insured against loss by fire, and the amount of the policies issued thereon may be proved by parol evidence, especially where it appears that the originals had been canceled and returned to the insurance office.

ID.—AMOUNT OF POLICIES—EXCESS OVER VALUE—IMPROPER CROSS-EXAMINATION—ORDER OF PROOF—DISCRETION—HARMLESS RULING.—

Where a representative of the board of trade had testified for the defendant that soon after his arrest he inventoried the stock and fixtures of the defendant and valued them at about eleven thousand dollars, though it was not proper cross-examination for the prosecution to prove by him that the aggregate amount of the insurance policies on the property exceeded twelve thousand dollars, yet the order of proof was in the discretion of the court, and the evidence being proper testimony in chief for the prosecution, its allowance on cross-examination was not prejudicial to the defendant, and does not constitute reversible error.

ID.—INSANITY OF DEFENDANT—QUALIFICATION OF EXPERT WITNESS—REJECTION OF EVIDENCE—DISCRETION OF TRIAL COURT—APPEAL.—

In determining the qualification of an expert witness to give an opinion upon the mental soundness of the defendant, the trial court has a broad, legal discretion, and its decision in rejecting his testimony will not be disturbed upon appeal, unless its discretion has been abused and its ruling rejecting the evidence is plainly and indisputably wrong. The fact that this court, if deciding the question at the trial, would, upon the showing made, have allowed the expert to testify, is not the test which should govern this court upon appeal.

ID.—EVIDENCE OF INSANITY—CHIMERICAL THEORY—REBUTTAL BY EXPERT.—

Where, as tending to show the insanity of the defendant, it was testified that he consulted a boiler-maker as to the feasibility of making a boiler so light, by the use of aluminum, that he could carry it on his back in prospecting tours, the prosecution may prove in rebuttal by a qualified expert witness that the theory or idea of the defendant was not so chimerical or improbable as to indicate mental unsoundness.

ID.—UNBALANCED MIND—EXCUSE FOR CRIME.—

Evidence indicating a mental change in the defendant, and that he had an unbalanced mind, does not establish an excuse for crime, where, as tested by the rules of the common law, the jury were authorized to find from the evidence that the defendant was not so insane as to be irresponsible.

ID.—VARIANCE—"BASEMENT ROOM"—"CELLAR."—

The distinction between a "basement room" and a "cellar" may be very slight; and where the defendant is properly charged with entry into a "basement room" with intent to commit arson, and the term "cellar" is not used in the statute, and the evidence sufficiently shows that the

place where the arson was attempted was a "room" in a "basement," where merchandise was stored, though called by some of the witnesses a "cellar" as well as a "basement," there is no substantial variance.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Joseph H. Budd, Judge.

The evidence showed that the basement of the adjoining store where the arson was attempted was partly underground. It had walls of brick, and was used for the storage of merchandise. It had a window in the rear, but was otherwise dark, and was lighted by gas. There were pillars in it for the support of the floor above. Shelves were built in it where merchandise was stored; and it had a floor and a partition. It was frequently spoken of by several witnesses as the "cellar," and also as "the basement." Further facts are stated in the opinion of the court.

J. G. Swinnerton, and J. J. Fitzgerald, for Appellant.

Tirey L. Ford, Attorney General, and Henry A. Melvin, for Respondent.

GAROUTTE, J.—The defendant has been convicted of the crime of burglary, and appeals to this court.

The information charged that defendant entered "the basement room of a certain store, with intent to commit arson." It is now claimed that the pleading does not state the commission of a crime. Section 459 of the Penal Code provides: "Every person who enters any house, room, apartment, tenement, . . . or other building, . . . with intent to commit grand or petit larceny, or any felony, is guilty of burglary." It is contended that "the facts constituting the arson should be alleged." But we deem the law of pleading in this state, as declared by the code and the authorities, does not demand it. In *People v. Nelson*, 58 Cal. 107, it was held that an indictment stating that the entry was made with intent to commit a felony was fatally defective; yet the court, in so holding, plainly intimated that an indictment of the character of the information here involved would be sufficient. The court in that case stated the question to be: "Was it necessary to allege an intent to commit a specific felony?"

and in answer to the interrogatory held that it was necessary. In *People v. Burns*, 63 Cal. 614, a case identical in principle with that at bar, it was held that the information was sufficient. In *People v. Smith*, 86 Cal. 238, the information was declared sufficient, and it was there charged that the entry was made with intent to commit "larceny."

There was an abundance of evidence introduced at the trial to prove the allegations of the information. Indeed, the evidence as to the *res gestae* was not contradictory to any extent, and defendant relied alone upon the plea of insanity. Defendant was engaged in the general merchandise business and was indebted to a considerable amount, although his assets appear to have largely exceeded his liabilities. The motive for the crime is claimed upon the part of the prosecution to have been a purpose to secure the insurance money payable upon the loss of his goods by fire. The policies of insurance were not introduced in evidence. Indeed, the prosecution did not seem to know where they were. Many objections were made by defendant going to the introduction of oral evidence bearing upon this matter of insurance. But we find none of the exception taken thereto possessed of substantial merit. The fact that the property carried insurance was a matter which could be proven by parol. Indeed, the witness Keyes so testified without objection. The witness Grunsky was asked: "Did your firm, at any time during the last year, issue to Mr. J. W. Goldsworthy any policy or policies of insurance for any insurance company upon his stock of groceries or other personal property about his grocery store?" This question was unobjectionable. We find no attempt made by the prosecution in the case in chief to prove by parol the amount of insurance resting upon this personal property, although we are strongly inclined to believe that such evidence would have been competent, especially so in view of the showing that the original policies of insurance had been canceled and returned to the San Francisco office.

The defendant placed one Harmon on the witness stand, who testified that, as a representative of the board of trade of the city of San Francisco, he inventoried and appraised the stock and fixtures of defendant soon after his arrest, and the

valuation was given by him at the sum of about eleven thousand dollars. Upon cross-examination he stated that he went to see defendant after his arrest to have some insurance policies of the stock transferred. He was then asked: "What was the aggregate of those insurance policies?" An objection followed that the evidence was not cross-examination and not the best evidence. The objection being overruled, the witness answered that it was some twelve thousand dollars. This evidence was not cross-examination; yet it was material and competent evidence for the state, if offered at the proper time. Our attention has been called to no case where the judgment has been reversed by reason of the admission of competent, material evidence after an objection that it was not cross-examination was improperly overruled. The trial court is allowed a wide range in fixing the order and manner of admitting competent evidence. The state could have been allowed by the court, for the time being, to have treated this witness as its own witness, and then have asked him this same question. Such a course marks an ordinary practice. And if that may be done, the ruling here assailed does not constitute reversible error. The remaining portion of the objection, to the effect that the answer did not call for the best evidence, is likewise unsubstantial. It already had been developed by the evidence that the policies had been canceled, and were without the jurisdiction of the court; but, in addition to that fact, we are satisfied the proof sought to be established, to wit, the aggregate amount of money called for by the policies of insurance, could be established by parol evidence. Indeed, the mathematical calculation as to the sum total of these various amounts represented by the insurance policies would have to be made by some person. The evidence of the witness Harmon as to the manner and time of the transfer of the insurance policies, while not cross-examination, in no way injuriously affected defendant's rights. The exception taken to the evidence of the witness Keys is disposed of by the conclusion already declared upon the consideration of the testimony of Harmon.

Error is claimed upon the part of the court in holding that Dr. Louis Maddock was not sufficiently qualified to give an opinion as an expert upon the mental soundness of defendant. In some jurisdictions it is decided that the trial court

is the absolute arbiter as to the qualifications of an offered expert. In this state the court has a broad legal discretion in deciding the question, and the ruling rejecting the witness must be plainly and indisputably wrong, or the appellate court will not disturb it. The fact alone that, upon the showing made at the trial, this court, if at *nisi prius*, would have allowed the offered expert to testify, is not the test which should govern here. Wharton on Criminal Evidence, section 406, in speaking as to experts says: "Except in an extraordinary case an appellate court will not reverse on account of a mistake of judgment on the part of the trial court in determining qualifications of this class." Greenleaf on Evidence, sec. 430f, thus declares the law upon the subject: "In most jurisdictions, it is declared that the determination of a witness' experiential qualifications should be left to the discretion of the trial court. The phrasing differs and the practice seldom lives up to the theory. In some courts this discretion is not reviewable; in others it is reviewable only in case of its abuse; in others it is said 'largely' to control. It cannot be doubted that this beneficial principle should be further extended and strictly observed, so that a witness' experiential qualifications should be invariably left to be determined by the trial court without review." Without making a recapitulation of the evidence here, we deem it sufficient to justify us in saying that the record does not disclose a state of facts which authorizes this court in holding that the trial court abused its discretion in rejecting the testimony of the proffered expert.

As tending to show the unsound mental condition of defendant, it was proven that he consulted a boiler-maker as to the feasibility of making a boiler so light by the use of aluminum that he could carry it upon his back in his prospecting tours. In rebuttal, the prosecution placed Professor Corey, of the State University, an expert upon the subject, on the stand, for the purpose of showing that the theory or idea of defendant was not so chimerical or improbable as to indicate mental unsoundness. In view of what we have already said in sustaining the action of the trial court in ruling upon the qualifications of experts, this witness must be deemed qualified. The evidence given by him was interesting as a publication of valuable information, and it certainly

was of a very general nature. But this may be said: If it tended to disprove the claimed chimerical ideas of defendant upon the use of aluminum as an element in the construction of steam boilers, it was proper and material, and, if it did not do so, then the error in admitting it was certainly harmless.

It is insisted that a fatal variance is disclosed between the allegations of the information and the evidence. The information charges the entry to have been made into a "basement room." It is now claimed that the evidence shows the entry to have been made into a "cellar." The difference between cellars and basement rooms in many cases is slight indeed. An entry into a cellar, with felonious intent, probably does not constitute the crime of burglary when tested by the statute, and for this reason, if no other, we would be slow to hold the place entered in this case to be a cellar rather than a basement room. But upon an examination of the record we are entirely satisfied the evidence amply supports the allegation of the information that the entry was made into a "basement room."

This case in its facts is most peculiar. The defendant, an old resident of the city of Stockton, of good reputation, engaged for years in a large commercial business, having a stock of goods with the appurtenances, the cost valuation being about the amount of the insurance resting upon the property, his liabilities only one-fourth of that amount, is detected at night in a basement adjoining his store, in the very act of applying a torch to the property of his immediate business neighbor in order that his own property may be destroyed and the insurance money obtained. The preparations made by defendant in order to secure an entire and certain destruction of the property were perfect and complete and were such as to not only surely result in the destruction of his own and his neighbor's property, but were such as to surely result in the loss of many lives of persons sleeping in the lodging-house situated upon the floor above. Upon the other side of the picture we find considerable evidence indicating an unbalanced mind and a mental change in the defendant evidently had been going on for a few years past. But an unbalanced mind, of itself, does not excuse crime. And in this case, tested by the rules of criminal law, the jury

could well say the evidence pointing to the defendant's insanity was not of that character which should acquit him of the heinous charge.

We have carefully examined the instructions given by the court to the jury, and find no substantial objection to them.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

[Sac. No. 666. In Bank.—December 7, 1900.]

THE PEOPLE ex rel. REBECCA THISBY, Appellant, v.
RECLAMATION DISTRICT No. 556, Respondent.

RECLAMATION DISTRICT—VALIDITY OF ORGANIZATION—QUO WARRANTO.

—A reclamation district regularly organized under section 3446 of the Political Code has a legal existence which cannot be successfully assailed in *quo warranto* if there is no existing swamp land or reclamation district within its limits.

ID.—DEFUNCT SWAMP LAND DISTRICT—REPEAL OF ORGANIC ACT—FAILURE TO REORGANIZE.—A swamp land district organized under the act of 1861, and failing to take any steps to reorganize under the act of 1868, which substituted a new scheme for the reclamation of swamp lands, and contemplated a reorganization of existing districts thereunder and expressly repealed the act of 1861, ceased thereafter to exist, and is not an obstacle to the subsequent organization of a reclamation district including its original limits.

ID.—REPEALING ACT—CONSTRUCTION OF PROVISIO.—The proviso in the act of 1878, which repealed the act of 1861, that "until such organization said districts now formed shall proceed under the laws now in force," is to be construed as applying to existing districts reorganizing under the repealing act, and as allowing them to proceed under the laws theretofore in force, during the period of transition, and not as intended to apply to an existing district which took no steps to reorganize under the act of 1878. [Beatty, C. J., dissenting.]

ID.—FORMER RECLAMATION DISTRICT ILLEGALLY ORGANIZED—FAILURE OF PETITION TO DESCRIBE LANDS.—A former reclamation district illegally organized, under the Political Code, owing to the failure of the petition for its organization to set forth "a description of

the lands by legal subdivision or other boundaries," is not a bar to the regular organization of another reclamation district.

Id.—GENERAL OBJECTION TO PETITION—JURISDICTION OF SUPERVISORS—OBJECTION UPON APPEAL.—The fact that the defective petition was objected to generally at the trial, and upon other grounds than that it did not confer jurisdiction upon the supervisors to act thereupon, cannot preclude the urging of such objection upon appeal.

Id.—DE FACTO DISTRICT—SUPPORT OF FINDING.—The *de facto* existence of the former reclamation district which has no *de jure* existence may be controverted; and a finding against its *de facto* existence is sufficiently sustained by proof that after the board of supervisors had approved the insufficient petition nothing further was done for over fifteen years, when it first began to act as a corporation, and acted for about one year, when it ceased to act entirely, and its members and officers long subsequently united in the regular organization of the reclamation district respondent.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. Matt. F. Johnson, Judge.

The facts are stated in the opinion of the court.

Ex-Attorney General W. F. Fitzgerald, Johnson & Johnson, Grove L. Johnson, and Devlin & Devlin, for Appellant.

A. L. Shinn, Catlin, Shinn & Catlin, and W. A. Gett, for Respondent.

THE COURT.—*Quo warranto*. The complaint alleges that defendant is illegally claiming to be and acting as a reclamation district, and that the organization of defendant was unlawful, and that it never became a reclamation district. A general demurrer was overruled and defendant answered, alleging the regular formation of defendant as a reclamation district on the eighth day of September, 1893, under the provisions of the Political Code.

Defendant had judgment that it "was a public corporation, to wit, a reclamation district, legally organized and existing under the laws of the state of California, and legally entitled to exercise corporate functions and powers." A motion for a new trial was denied, and plaintiff appeals from the order and from the judgment.

The court found that defendant was organized under section 3446 of the Political Code. Appellant does not dispute that on the face of the proceedings defendant was regularly organized. It is claimed by plaintiff that on July 13, 1861, the state board of swamp land commissioners, pursuant to law, formed the entire body of land known as Andrus island, in Sacramento county, comprising about seven thousand six hundred and twenty-four acres, into a swamp land district designated as swamp land district No. 8, a portion of which was included within the boundaries of defendant district; that under the act of March 28, 1868 (Stats. 1867-68, p. 507), known as the Green act, the board of supervisors of said county, on April 7, 1869, organized reclamation district No. 75 out of part of the land included in district No. 8; that said board, on December 9, 1874, organized another reclamation district from the lands in said Andrus island, including part of the land in district No. 75, and known as reclamation district No. 213; that each of these districts includes lands embraced within the boundaries of defendant district; that if any one of them has a legal existence the defendant district cannot stand, since it was not organized under section 3481 of the Political Code relating to the formation of a district from lands already embraced within the boundaries of an organized district, but was formed under section 3446 of said code, upon the assumption that no organized district stood in its way. The court found that neither district No. 8, nor district No. 75, nor district No. 213, has now, or ever has had, any legal existence as a swamp land or reclamation district.

1. Appellant interposes the organization of swamp land district No. 8 as an insuperable barrier to the valid organization of defendant district. District No. 8 was set apart as a swamp land district under the act of 1861, *supra*. The scope, purpose, and effect of this act were concisely yet comprehensively set forth in *People v. District No. 551*, 117 Cal. 114, which was a case similar to the one now presented. All the points made in support of district No. 8 in this case were made in the case cited, except that it is now claimed that section 32 of the act of March 28, 1868, was overlooked, and that the effect of this section was to leave district No. 8 in the control of the board of supervisors, under the act of April 2, 1866. (Stats.

1865-66, p. 799.) The act of 1868 substituted a new scheme for the reclamation and sale of swamp and overflowed lands to take the place of the various schemes developed in preceding statutes. At the close of section 32 is found the following provision: "After any district now formed shall organize under the provisions of this act, the supervisors of the county shall turn over to the trustees all the books and papers in their possession relating solely to that district; provided, that until such organization, said districts now formed shall proceed under the laws now in force." Appellant calls attention to the plain language in this proviso, and claims that to give it effect, as must be done, there is no escape from his position, and therefore district No. 8 is still operating under the act of 1866. Section 71 of the act of 1868 expressly repeals the act of 1866, together with a number of other acts on the same subject, and we have no doubt that the later act was intended to take the place of the act of 1866 and not to leave the latter act in force as to all districts theretofore organized. It certainly was not intended that the two acts were to remain in force, else the act of 1866 would not have been in terms repealed, and some more explicit provision would have been placed in the act showing such intention. The later act contemplated a reorganization of the districts previously formed, but it very properly provided that such districts as intended to continue in existence should, during the period of transition, proceed under the laws theretofore in force. The proviso applied to reorganized districts, but did not and was not, in our opinion, intended to apply to a district, like No. 8, that took no steps to reorganize, and so far as the record shows, transacted no business after May 5, 1869. At this last meeting the board of supervisors passed a resolution annulling all contracts for works of reclamation in the district, and directed the clerk to notify the controller of the state that all contractors have been fully paid for work contracted prior to March 28, 1868 (the date of the passage of the act of 1868), and requesting him to transfer to the supervisors of Sacramento county all books and papers in his possession relating to said district, and to draw his warrants for the cash balances, if any, standing to the credit of said district. This action was apparently in compliance with section 47 of the act of 1868 and is con-

sistent with an intention to reorganize under the act, and we find nothing in any of the minutes offered in evidence to show that the district attempted or desired to continue its existence under the repealed act of 1866, or any other act.

Respondent presents sundry requirements of the act of 1861 with which the district failed to comply and which it is claimed were essential to the forming of a district, but we do not deem it necessary to go over this ground. We are satisfied that the court correctly held in *People v. District No. 551, supra*, that districts formed under the act of 1861 went out of existence when by the later acts the legislature changed its policy for their government and control; and as appellant claims district No. 8 to be a district under the act of 1861 we must hold that it no longer exists.

2. Appellant makes a feeble claim that District No. 75 was legal and stood in the way of forming the defendant district. All that is said in support of the claim is that the petition was in due form, properly published, and duly approved by the board of supervisors. It does not appear that it ever after assumed to act, or that any business was transacted in its name. The court, however, found that none of the lands included within the boundaries of this district fell within the boundaries of defendant district, and this finding is not attacked. There is then no conflict here.

3. But appellant contends if there be doubt as to the existence of district No. 75, because formed under the act of 1868, there can be no doubt that district No. 213 was legally organized under the Political Code as it stood when it was organized December 9, 1874. Section 3446 of that code required the petition, among other things, to set forth "a description of the lands by legal subdivisions or other boundaries." The petition described the various bodies of land as "tract all of swamp land survey Nos. 329 and 330," and similarly as to all the tracts of the several petitioners. The same method of description was held jurisdictional and insufficient in *Ralston v. Board of Supervisors*, 51 Cal. 592, and also in *Ferran v. Supervisors*, 51 Cal. 307, by two of the judges. *Ralston v. Board of Supervisors, supra*, has never been overruled or questioned so far as we are advised, and we see no reason why it should be. Appellant does not dispute

the correctness of these decisions, but meets them by claiming: 1. That the decision of the board of supervisors on the question is final; 2. That their decision cannot be collaterally attacked; 3. That a corporation cannot be attacked collaterally; and 4. That at the trial defendant did not make the objection, and it is too late to raise the question now. Defendant did not at the trial make the specific objection that the land was not described in the petition. The objection upon the offer of the petition was that it was irrelevant, immaterial, and incompetent, and some specific objections were stated, but none directly reaching the point in question. Appellant cites numerous cases to show that an objection cannot be first raised in the supreme court, especially one which could have been cured in the lower court; and two cases are cited—to wit, *Howard v. Harmon*, 5 Cal. 78, and *Shay v. Superior Court*, 57 Cal. 541—to the point “that an objection as to jurisdiction must be raised first in the court below.” In the first of these cases the objection was that no appeal bond had been filed in the justice’s court when the appeal was taken to the county court. The objection was not made in the court below, and it was held too late to make it here because if it had been made in the county court it would have been its duty to hear the excuse for the failure, and if sufficient to allow the bond then to be filed. In the other case there were some defects in the proceedings to appeal the case from the justice’s court to the superior court, as to which no objection was raised until the case came here, where it was urged that the superior court had no jurisdiction to try the case. It was held that, as no objection was made to the regularity of the proceedings in the court below, it was too late to take advantage of the insufficiency of the notice of appeal or of the undertaking. The many cases cited by appellant relate to questions of incompetent evidence, admitted without objection, to the regularity of proceedings or to objections which if presented in time might have been obviated. In the case now here, there is no dispute but that the petition as shown in the record is the petition as presented to the board of supervisors; it is not suggested that any evidence would have cured the defect in the description or that it could have been cured. The objection here goes to the

jurisdiction of the board to act upon the petition. It does not depend upon their adjudicating certain facts upon the existence of which their jurisdiction depended. Their jurisdiction depended upon the presentation of a petition setting forth the jurisdictional facts, failing in which the petition conferred no jurisdiction, and the objection could have been taken at any stage of the proceedings and can be taken for the first time here. (*In re Grove Street*, 61 Cal. 438.)

Appellant contends, conceding that the steps taken were not legally sufficient to form district No. 213, that it was a *de facto* corporation and cannot be attacked collaterally nor otherwise except in a suit by the state. (Citing *Dean v. Davis*, 51 Cal. 406, and *People v. La Rue*, 67 Cal. 526, and some other cases.)

In the present instance it does not appear to be necessary to consider whether and to what extent defendant is attacking district No. 213 collaterally. Defendant answered the challenge of the state by showing a charter grounded upon strict compliance with the law. The form and regularity of the proceedings by which it was called into existence are not questioned. But plaintiff interposes what it claims is a legally organized district which embraces all of the land included in defendant district, and therefore it is claimed that defendant was not legally formed. Plaintiff, as we have seen, failed to show compliance with the law, and proof of its *de jure* existence failed. Plaintiff then relied on a *de facto* organization, and certain evidence was submitted in support thereof. Its *de facto* existence became an issuable fact as much as did the fact of its *de jure* existence. The rule invoked by plaintiff does not preclude defendant from controverting the *de facto* existence of the district asserting it: *Oroville etc. R. R. Co. v. Plumas County*, 37 Cal. 354; *Martin v. Deetz*, 102 Cal. 55.¹ What are the facts? An insufficient petition was filed December 9, 1874, with the board of supervisors and was on that day approved. Nothing further was done until July 8, 1890, when one of the original petitioners filed a petition asking an order of the board to call an election for trustees, which was done by the board, it appearing that by-laws had been previously adopted, although at what date does not appear. On October 3, 1890, the result of the election was reported to the supervisors, showing the election of Sol. Runyon, G.

¹ 41 Am. St. Rep. 151.

A. Knott, and P. Crew as the trustees chosen. On February 6, 1891, the trustees reported to the board of supervisors that they had "employed an engineer to survey, plan, locate, and estimate the cost of the works necessary for such reclamation," etc.; that he had made report in writing which they had approved January 14, 1891, and inclosed with their report to the board a copy of the engineer's report. The trustees requested the board of supervisors to appoint three disinterested persons to view and assess upon the lands a charge proportionate to the whole expense of forty thousand dollars (the estimated cost of the work), etc., and on February 6, 1891, the board appointed three persons as prayed for by the trustees. No further action has been taken by the district. On August 7, 1893, two years and a half after the last action of district No. 213, petition for the organization of defendant was filed and was signed by Runyon, Knott, and Crew, who were trustees of district No. 213, and by the owners of more than half of the land included in district No. 213, and defendant district included all the lands within the boundaries of district No. 213. The court found that the prior districts never had any legal existence, and the finding rests upon the lack of any legal organization such as made them corporations *de jure*, and upon the evidence tending to show that they were not claiming in good faith to be districts nor doing business as such and were not corporations *de facto*. Just how much business must be done by a corporation assuming *de facto* powers, or what facts showing good faith are necessary to constitute the corporation a *de facto* organization, can be determined by no fixed rule. In this case it appears that nothing was attempted to be done after the petition was filed for over fifteen years; the supervisors were then asked to call an election for trustees of the district, and this was done and trustees were chosen; they employed an engineer to make a plan, and he reported and the report was approved; the supervisors were asked to appoint persons to assess the lands, and this the board did in 1891, since which time nothing further has been done; the trustees appointed for district No. 213 united with other of the original petitioners and formed a new organization embracing all the lands included within district No. 213, and were going forward with the work of reclamation when this action was begun; none of the

petitioners for district No. 213 are complaining, and there is no evidence that any person interested desires that the district should be kept upon its feet; it has no legal existence, and its right to continue because a *de facto* concern is interposed now rather to defeat what appears to be an effort, after many years of inaction, to do something toward keeping faith with the general government and for the benefit of the land owners, than to enable it to go forward itself to do the work contemplated in its creation. It would seem to be an effort to prevent reclamation rather than to promote it, and we cannot, therefore, say that the finding of the court is unsupported by the evidence.

The judgment and order are affirmed.

BEATTY, C. J., concurring.—I concur in the judgment, but I dissent from so much of the opinion as rests upon the proposition decided in *People v. District No. 551*, 117 Cal. 114, that swamp land districts formed under the act of 1861 ceased to exist after the passage of the Green act in 1868. I think all districts which had been “formed” in the sense of section 32 of the latter act (Stats. 1867-68, p. 515) were by that section kept in existence, and that for the purposes of such districts, until reorganized under the new law, the original act of 1861 and the amendatory act of 1866 remained in force notwithstanding their repeal for all other purposes. If, therefore, district No. 8 was ever “formed,” within the meaning of the Green act, I should be forced to conclude that it was still in existence when the proceedings were had for the organization of the defendant, and that those proceedings under section 3446 of the Political Code were ineffectual.

But the superior court has found, upon evidence which I think sustains the finding, that district No. 8 never had a legal existence. It seems to have acquired the designation of swamp land district No. 8 solely by reason of the petition for its formation and the order of the commissioners for a preliminary survey. From that time forward it was called swamp land district No. 8 in reports of engineers and state officers and acts of the legislature. But it clearly was not constituted a swamp land district by a mere order of the commissioners for a preliminary survey, the only result of which might be to demonstrate the fact that no reclamation could be effected. And yet, for the purpose of that order, and for

the purpose of designating the fund out of which the expenses of the preliminary survey were to be paid, it might be, as in fact it was, conveniently designated as swamp land district No. 8. The result of the preliminary survey, made under the order of the commissioners, was to show the reclamation could not be effected with the funds available, and no plan of reclamation seems to have been adopted—no contract was let, and all proceedings ended with the payment of the expenses of the survey. This was not, in my opinion, a formation of the district in the sense of section 32 of the act of 1868. It was not within the reason of that proviso. Such, indeed, seems to have been the view of the matter upon which the board of supervisors, and all others concerned, have acted during a period of nearly forty years prior to the proceedings for the formation of the defendant.

Upon the grounds thus briefly indicated I hold that swamp land district No. 8 was no obstacle to the formation of defendant, and as to the other districts I concur in the principal opinion.

[S. F. No. 1383. In Bank.—December 10, 1900.]

J. J. RAUER, Respondent, v. JOSEPH MERANI et al., Appellants.

GOODS SOLD—TERM OF CREDIT—EVIDENCE.—Where goods are sold on credit, an action cannot be maintained for the purchase price until after the expiration of the term of the credit. In this case the evidence shows a sale on credit and that the action, as to a part of the purchase price, was commenced before the term of the credit had expired.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

James A. Devoto, for Appellants.

George H. Perry, for Respondent.

BEATTY, C. J.—This is a suit to recover the price of goods sold. Plaintiff had judgment, and defendants appeal from the judgment and from an order denying a new trial.

The claim on the part of appellants is that the action was commenced before payment was due, and their evidence is to the effect that the goods were sold on thirty, sixty and ninety days' time, as evidenced by three promissory notes executed and delivered by them, payable September 15, October 15, and November 15th. The complaint was filed August 28th.

The assignors of plaintiff, who sold the goods, testified that although the notes referred to were executed and tendered by defendants, they were not accepted, and that the sale was not upon the time specified therein. As to the real terms of the sale the testimony of one of the vendors was quite indefinite, but not inconsistent with that of his copartner, who stated that the goods were sold on Saturday and were to be paid for, one hundred dollars on the following Monday, one hundred dollars the following week, and the balance the week following. As the whole of the second and third weeks, respectively, were allowed for the second and third payments, there was a credit of fourteen and twenty-one days given according to the only evidence introduced by the plaintiff.

The goods were sold in August, but the evidence does not show at what date, and, consequently, it does not appear that more than one hundred dollars was due at the time the action was commenced. If the sale took place on the 15th, as may be inferred from the evidence of defendants that their first (or thirty-day) note was made payable on September 15th, the final payment, even according to plaintiff's evidence, was not due on August 28th, when the complaint was filed. This being so, the judgment, which was for the whole price of the goods, is unsupported by the evidence.

The judgment and order appealed from are reversed, and cause remanded.

Temple, J., Van Dyke, J., Garoutte, J., and McFarland, J., concurred.

[S. F. No. 1649. Department Two.—December 11, 1900.]

C. C. WHEELER, Respondent, v. MARY ELLEN
KARNES, Appellant.

JUDGMENT IN FORECLOSURE—STAY BOND UPON APPEAL—INSUFFICIENCY OF SURETIES—SETTING ASIDE VOID SALE.—A stay bond upon appeal from a judgment foreclosing a mortgage is operative, notwithstanding the pecuniary insufficiency of the sureties, until the failure of the sureties to justify after exception taken; and a sale made after the giving of such stay bond, and prior to exception taken to the sureties, is void, and should be set aside upon motion.

ID.—STATUTORY REGULATION OF STAY BOND—EQUITABLE CONSIDERATIONS NOT PERMISSIBLE.—The matter of a stay bond on appeal is one of statutory regulation; and the statute governs irrespective of equitable considerations. The legislature has failed to provide for the contingency of injustice to a judgment creditor by the mere filing of a stay bond with sureties not having sufficient pecuniary liability.

ID.—REPETITION OF SURETIES FOR DIFFERENT SUMS.—A stay bond which is sufficient in form and amount is not vitiated by the fact that some of the sureties are on it twice for different sums.

ID.—ORDER FIXING STAY BOND IN FORECLOSURE—WASTE, OCCUPATION, AND DEFICIENCY—GENERAL AMOUNT—SPECIFICATIONS IN BOND.—The order fixing the amount of a stay bond upon appeal from a judgment foreclosing a mortgage need not specify separate amounts for waste, occupation, and deficiency, but may merely name the whole amount deemed necessary to meet the requirements of section 495 of the Code of Civil Procedure, although the undertaking must contain covenants for each of those matters covered by that section.

APPEAL from an order of the Superior Court of Fresno County refusing to set aside a sale under foreclosure of a mortgage. J. R. Webb, Judge.

The facts are stated in the opinion of the court.

W. P. Thompson, C. C. Merriam, and Lloyd & Wood,
for Appellant.

The bond stayed execution until the sureties failed to justify, and the sale made the day after the bond was given was void, and must be vacated. (Code Civ. Proc., secs. 946, 948;

Duncan v. Times-Mirror Co., 109 Cal. 602, 605; *Swasey v. Adair*, 83 Cal. 136; *Schacht v. Odell*, 52 Cal. 447; *Sam Yuen v. McMann*, 99 Cal. 501; *Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 228, 229; *Boyer v. Superior Court*, 110 Cal. 403.) The amount of the bond was properly fixed by the order of the court; and the undertaking properly specified the covenants required in regard to waste, occupation, and deficiency. (Code Civ. Proc., sec. 945; *Boob v. Hall*, 105 Cal. 413, 419.) The bond was sufficient in form and amount. (Code Civ. Proc., sec. 1057.)

Horace Hawes, and H. H. Welsh, for Respondent.

The order fixing the bond was void for uncertainty, and failure to specify the statutory requirements. (Code Civ. Proc., sec. 945; *Von Schmidt v. Widber*, 99 Cal. 511, 515; *Campbell v. Jones*, 41 Cal. 515; *Boob v. Hall*, 105 Cal. 413.) The bond was an evasion of the statute. (Code Civ. Proc., sec. 1057.) The sureties did not agree to bind themselves to pay the aggregate sums set opposite their names. The motion came nearly one year after the sale, and was without merit.

McFARLAND, J.—Appeal by defendant Karnes from an order refusing to set aside a sale of mortgaged premises under a decree of foreclosure.

Judgement in the foreclosure action was entered November 19, 1896, against the appellant Karnes and others. On April 8, 1897, the appellant took an appeal to this court from the judgment, by giving and serving notice of appeal and filing a three-hundred dollar undertaking, which appeal is still pending.

Afterward the commissioner appointed to sell the mortgaged premises gave notice of a sale thereof to take place June 3, 1897. On May 29, 1897, the judge of the court below made an order fixing the amount of a bond to stay proceedings, under the provisions of section 945 of the Code of Civil Procedure, at three thousand and fifty dollars; and on June 2d appellant filed a stay bond in that amount, and notified the attorneys for plaintiff that such bond had been filed; and on June 3, 1897, before any attempted sale, she notified the commissioner of the filing of such bond and that no exception to the sureties thereon had been made, and objected to

and protested against any sale being made. Nevertheless, the commissioner proceeded on said June 3d and made the sale. On June 16th—thirteen days after the sale—plaintiff excepted to the sureties, and they failed to justify. Afterward, in May, 1898, appellant, on due notice, moved the court to vacate the sale as void because made under the circumstances above stated; and on May 27, 1898, the motion was regularly heard and denied. From the order denying the motion this present appeal is taken.

We think that it was error to refuse to set aside the sale. The fact that after the sale there was an exception to the sureties, and they failed to justify, did not make the bond inoperative at the time the sale was made. The whole matter is one of statutory regulation, and the statute governs irrespective of equitable considerations. The provision of the statute on the subject—section 948 of the Code of Civil Procedure—is that the adverse party may except to the sureties at any time within thirty days after the filing of the undertaking, and that unless the sureties, or other sureties, justify within twenty days thereafter, “execution of the judgment, order, or decree appealed from is no longer stayed.” But the execution is stayed until the expiration of the time allowed for the justification; and therefore in the case at bar, as the stay was operative when the sale was made, the latter was unauthorized and invalid. Of course, some injustice might be done a judgment creditor by the finding of a stay bond with sureties not having sufficient pecuniary ability; but the legislature has not made provision for such contingency. (See *Duncan v. Times-Mirror Co.*, 109 Cal. 605.) At the worst the judgment creditor would only suffer some delay through the necessity of postponing the sale until the time had arrived for the justification of the sureties.

The stay bond was sufficient in form and amount; the fact that some of the sureties are on it twice for different sums does not vitiate it, and the affidavits accompanying the undertaking were clearly sufficient.

The order of the judge fixing the amount of the stay bond was proper and sufficient in form. (*Boob v. Hall*, 105 Cal. 413.) It was not necessary for the judge to name in the order separate amounts for waste, occupation, and deficiency.

It was sufficient to name the whole amount which in his judgment would be necessary to meet the requirements of section 495, although the undertaking itself must contain covenants for each of the matters covered by that section.

The order appealed from is reversed.

Temple, J., and Henshaw, J., concurred.

[Sac. No. 757. Department Two.—December 11, 1900.]

In the Matter of the Estate of W. H. KRUGER, Deceased,
MARY A. KRUGER, Executrix and Legatee, Appellant,
v. J. L. MERGUIRE, Executor, and J. M. WALLING,
Respondents.

ESTATES OF DECEASED PERSONS—EXECUTOR'S ACCOUNT—ALLOWANCE TO ATTORNEY—NEGLIGENCE IN SUIT—GENERAL EMPLOYMENT—FINDING—APPEAL.—Upon the settlement of an executor's account including an allowance to an attorney, where it was claimed by the executrix, who was a legatee, that the attorney was negligent in the prosecution of a suit to which the executors were parties, and the court found that the general employment of the attorney included the conduct of such suit, the executor and attorney, as respondents to her appeal, cannot question such finding; and the fact that the attorney regarded the suit as a distinct employment, and did not ask for compensation therefor, could not prevent the question of such alleged negligence from being considered in fixing his compensation as attorney for the executors, under such finding.

ID.—NEGLIGENCE UPON MOTION FOR NEW TRIAL.—An attorney is negligent in the conduct of a cause, upon motion for a new trial, in failing to present the proposed statement and amendments to the judge for settlement within the period provided by law, and in failing to have any facts showing a valid excuse for the delay incorporated into the statement. It does not excuse such negligence that a valid excuse in fact existed, which was not so incorporated and certified in the statement.

ID.—ARGUMENT UPON APPEAL—EVIDENCE OF NEGLIGENCE.—An argument upon appeal from the evidence of the negligence of the attorney for the executors in not incorporating an excuse in his statement on motion for a new trial in another cause need not be shown to have been first made in the court below.

Id.—LIABILITY OF ATTORNEY FOR NEGLIGENCE.—An attorney is liable for a want of such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise.

APPEAL from a decree of the Superior Court of Nevada County settling the account of an executor. F. T. Nilon, Judge.

The facts are stated in the opinion of the court.

Fred Searls, and George T. Wright, for Appellant.

P. F. Simonds, for Respondents.

TEMPLE, J.—This is an appeal from a decree settling the sixth account of one of the executors, and the appellant, as execute and legatee, seeks to reverse the order or decree as to the allowance of the sum of six thousand dollars for legal services rendered the executors.

The attorney was employed in 1891 with the understanding that he should render such services as the executors might require, and that he should receive such compensation for his services as the court should deem reasonable—meaning, no doubt, such sum as the court would allow to the executors.

Upon the settlement of the fifth annual account, one of the executors asked the court to fix the value of the legal services rendered, which the court then did. From that order the present appellant appealed to this court, and the order was reversed on the ground that the claim for an allowance of an attorney's fee was not contained in the account as filed, and those interested in the estate had no notice that such allowance would be made. (*Estate of Kruger*, 123 Cal. 391.)

After filing the *remittitur* from this court on that appeal the sixth account was filed, in which the statement was contained that the attorney was entitled to be paid a reasonable fee for valuable services rendered by him, such fee to be fixed by the court on that settlement. Upon the day for such settlement the appellant objected to the allowance of any attorney's fee, on the ground, substantially, that the estate had been injured by the negligent performance of duty by the attorney in a sum far exceeding the claim made on behalf of the attorney. The court allowed as an attorney's fee six

thousand dollars, which ruling the appellant claims is not sustained by the evidence.

There was testimony to the effect that the services were worth ten thousand dollars, and this testimony was not directly controverted. Indeed, it may be said the contestants admit that the fee allowed would be reasonable but for the fact that, through the negligence of the attorney in a certain law suit brought against the estate, it incurred a loss of a large amount of property and was compelled to pay seventeen thousand dollars, besides costs, which would have been saved to the estate if the attorney had properly discharged his duty.

It was contended on behalf of the attorney that his employment and the service he rendered in the action alluded to was separate and distinct from his employment as attorney for the executors in the administration of the estate, but the court found against him on this point, and neither he nor the executor can question the ruling. We are bound to regard the service rendered in the suit as part of the service rendered in pursuance of his employment to aid the executors generally, and the fact that he did not ask for any compensation for service rendered in that case will not prevent the question of such alleged negligence from being considered in fixing his compensation as attorney for the executors.

The suit in question was brought by one P. Henry against the executors of W. H. Kruger, deceased, and also against the executors of E. J. Brickell, deceased, said Brickell having been a partner in business with Kruger, deceased, to obtain an account in regard to certain property alleged to have been held in trust by Kruger and Brickell, for judgment in the sum of sixty-two thousand dollars, and to compel the conveyance of certain property. The defendants answered, denying the alleged rights and equities, and all indebtedness, the said attorney representing the estate of Kruger in pursuance of said employment. Judgment went against said executors for a reconveyance of the property, and for twenty-eight thousand dollars found to be due said plaintiff on the accounting, and for costs. The executors, by their said attorney, in due time took the proper steps to move for a new trial, and said attorney duly prepared and served a statement on said motion November 21, 1893. The plaintiff in that ac-

tion served his proposed amendments to said statement November 28, 1893. On the second day of December, 1893, said attorney notified plaintiff's attorney in that action that the proposed amendments would not be accepted, and that the statement and proposed amendments would be presented to the judge for settlement November 11, 1893, which was three days too late. At the time of settlement the plaintiff in that case objected to the settlement on that ground, and, when his objection was overruled, caused his objection to be certified in the statement, and although there was an apparent failure to present the statement for settlement in time, the moving party did not cause to be inserted any saving explanation. Afterward, the supreme court, on motion of the respondent in that case, dismissed the appeal, solely for this defect. (*Henry v. Merguire*, 106 Cal. 142.) The reasoning upon this point is tersely stated in the syllabus: "Where the record shows that the proposed statement on motion for a new trial, and the proposed amendments thereto were presented to the judge upon notice after the expiration of the ten days prescribed by law, and that the settlement was objected to by the other party, and no excuse appears in the record for the delay, the delay is fatal," etc. The court said: "Here no excuse for the delay is shown, and it can make no difference whether it was for three days or fourteen days, or seven months."

It will be seen that the charge of negligence is, first, in failing to present the proposed statement and proposed amendments to the judge for settlement within the period provided, to wit, within ten days after receiving the proposed amendments; or, in case there was a valid excuse for the delay, in failing to have the facts constituting such excuse incorporated into the statement.

Confessedly, the statement and proposed amendments were not presented to the judge within ten days; and confessedly, also, when they were so presented the settlement was objected to on the ground that the court had lost jurisdiction of the case and could not then settle the statement because of such delay, and, the objection being overruled, were incorporated into the statement, which did not disclose any excuse for the delay. And it must be admitted that for one of these reasons

the order for a new trial which was made, based upon such statement, was reversed.

The respondent here contends that such excuse did exist; that he handed the proposed statement and amendments to the judge in the presence of Mr. Ford, who represented the plaintiff in the action of *Henry v. Merguire, supra*, and the judge then appointed the day for settlement, and notice was given of such appointment. This, it is contended, is equivalent to the method provided in section 650 of the Code of Civil Procedure, which authorized him to hand the papers to the clerk for the judge, who then must appoint a day for settlement, of which the clerk must give notice. It is also contended that since the opposing attorney was present notice to him was not necessary, and this was itself a presentation to the judge for settlement. The notice actually given of the day when it would be presented for settlement is inconsistent with each contention, and when the documents were handed to the judge admittedly no notice had been served on Mr. Ford, and the attorney then testified that Mr. Ford then made objection to the proceeding, though he did not remember what specific objection it was. Certainly, then, the law was not complied with, and Mr. Ford did not consent to the day appointed.

But if these facts constituted an excuse they should have been stated in the statement when it was settled. The objection was made that the court had no power to settle and certify the statement because of the lapse of time, and without explanation no one could have doubted that the objection was good. The court overruled the objection and Mr. Ford had his exceptions duly certified. Then it was plainly incumbent upon the moving party to cause the justification for the delay to be certified in the statement. This construction of the statute had been declared by this court. (*Higgins v. Mahoney*, 50 Cal. 444; *Tregambo v. Comanche etc. Mining Co.*, 57 Cal. 504; *Connor v. Southern Cal. Motor Road Co.*, 101 Cal. 429.)

Counsel for respondents say the point that the excuse was not incorporated in the statement was not made in the probate court. The fact was proven, and when the attorney for the executors was testifying his attention was called to it.

He said: "These facts were not incorporated in the statement on motion for a new trial. Counsel did not then believe . . . that seven days was invalid when five should be required." Of course, no such objection that seven days' notice was given was ever made, but the remark shows that the point was made. But there is no such rule that points not made at the trial cannot be made here, but that certain objections to evidence or the procedure cannot be made for the first time in the appellate court. This is not an objection in this case, but an argument from the evidence that counsel was negligent. It was not necessary to show that the same argument was made below, and surely the bill of exceptions would not show this, and it may be added that appellant now asserts that it was presented and fully argued in the lower court.

The degree of learning and skill, as also the degree of diligence, for which an attorney is responsible was discussed in *Gambert v. Hart*, 44 Cal. 542. It is said: "The true rule of liability undoubtedly is that an attorney is liable for a want of such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise."

The facts in that case have a close analogy in essential matters to the facts of this case, and upon the principles there declared it cannot be doubted that actionable negligence was shown here.

But even if the negligence was not of such a nature as to be actionable, as stated on the last appeal, it should still have been considered in determining the value of the services. If because of the unskillful or negligent manner in which the service was performed it was a detriment and not an advantage, no compensation should have been allowed.

The order or decree settling the account of the executor is reversed.

Beatty, C. J., and McFarland, J., concurred.

[S. F. No. 1579. Department Two.—December 11, 1900.]

SOPHIA MAY, Respondent, v. SEWELL HATCHER, Appellant.

JUDGMENT FORECLOSING MORTGAGE—MOTION TO VACATE—LAPSE OF TIME.—A motion to vacate a judgment foreclosing a mortgage not void on its face, made more than six months after the entry of the judgment, is too late, and must be denied.

ID.—JUDGMENT NOT VOID—ABSENCE OF SEPARATE FINDINGS.—The absence of separate findings, or the incorporation of findings in the judgment of foreclosure, cannot render the judgment void upon its face.

ID.—PREMATURE ENTRY OF DEFAULT—AMENDMENT NOT SERVED—ERROR—VALIDITY OF JUDGMENT.—The premature entry of default against defendants in the foreclosure suit who made default and did not ask to have their default set aside, and the failure to serve them with a copy of an amended complaint, renders the judgment against them merely erroneous and subject to reversal upon appeal, but in the absence of an appeal does not render the judgment foreclosing the mortgage void upon its face.

ID.—SALE UNDER FORECLOSURE OF MORTGAGE—MOTION TO VACATE—COMMISSIONER'S OATH—FILING.—A motion to vacate a sale under a judgment not void foreclosing a mortgage, made after the judgment had become final, cannot be entertained upon the ground that no written oath or affidavit of the commissioner who made the sale is on file in the clerk's office. The law does not require the commissioner to make a written affidavit, or to file it anywhere; and it is sufficient if the record shows that he was sworn.

ID.—PRIOR INVALID SALE—PUBLICATION OF NOTICE—AMENDED NOTICE.—The fact that the commissisoner made a prior invalid sale, which was set aside for insufficiency of notice, cannot invalidate a sale subsequently made upon due notice; and the fact that a wrong date was first published cannot affect the sale where an amended notice was sufficiently published prior to the sale.

ID.—INADEQUACY OF PRICE.—Mere inadequacy of price is not of itself sufficient ground for vacating a sale regularly made under foreclosure of a mortgage, and a motion to vacate such sale not presenting that ground, and having meager evidence of inadequacy of price to support it, cannot be granted on that ground.

APPEAL from an order of the Superior Court of Santa Clara County denying a motion to vacate a judgment and sale under foreclosure of a mortgage. M. H. Hyland, Judge.

The facts are stated in the opinion of the court.

N. E. Wretman, and Nicholas Bowden, for Appellant.

J. C. Black, and Thomas C. Huxley, for Respondent.

McFARLAND, J.—This is an action to foreclose a mortgage executed to plaintiff by the defendant Michael Ryan. Other persons were made defendants as claiming some interest in the property. Judgment of foreclosure was entered March 1, 1897, and the mortgaged premises were sold by a commissioner appointed for that purpose on June 7, 1897, to plaintiff. On December 4, 1897—nine months after the entry of the judgment, and three days less than six months after the sale—Sewell Hatcher, claiming to have purchased the interest of the mortgagor and his wife about five months after the sale, moved the court to vacate the judgment, and also to vacate the sale. The court denied the motions, and from the order denying them Hatcher appeals.

We really observe nothing in the record which would entitle the appellant to have the judgment vacated, even if the motion had been made in time; but the motion was too late, for a judgment, unless void on its face, cannot be vacated on a mere motion unless it be made at least within six months after the entry of the judgment. In the case at bar, the judgment was clearly not void on its face. The main contentions of appellant on this point are: 1. That the judgment is void because there were no findings; and 2. Because after a certain amendment to the complaint had been served on the defendant J. H. Lyndon, who is alleged to have been the assignee in the insolvency of the defendant Michael Kane, and on the defendant Mary Kane, who is alleged to have been a subsequent judgment creditor of Michael Kane, default was entered against them by the clerk one day too soon. Lyndon and Kane had been brought into court by service of the summons and original complaint. As to the first contention, as a matter of fact there are sufficient findings, although they are irregularly put in the judgment itself instead of being in a separate document called "findings"; but, if they cannot be considered as findings, it is sufficient to say: 1. That the judgment record does not show that findings were

not waived, and, therefore, under any view the judgment would not be void on its face for the reason assigned; and 2. The absence of findings would not make the judgment void, but at most would only be error reviewable on appeal.

2. Appellant is not concerned with the supposed rights of Lyndon and Kane; they did not ask to have the default set aside, nor did they make any effort to be allowed to answer the amendment; and, even as to them, what happened after the service of the summons and the original complaint, at most, "rendered the judgment erroneous simply, not void." (*In re Newman*, 75 Cal. 220.¹)

The court did not err in denying the motion to vacate the sale. The point mostly argued by appellant for the reversal of this order is that the commissioner was not sworn to perform his duties. We need not discuss the question here whether his failure to be sworn, if such failure had been shown, would have vitiated the sale, for there was ample proof that he was sworn. Appellant's position is that the facts that no written affidavit of the commissioner was on file in the clerk's office, and that the clerk's register of actions did not show that such affidavit had been filed, are conclusive proof that no oath was taken, and that no other evidence was admissible on the subject. But this position is not tenable. The statutory provisions touching the matter is merely that "the commissioner, before entering upon his duties, must be sworn to perform them faithfully." (Code Civ. Proc., sec. 729.) There is no provision that he must make a written affidavit, or that an affidavit must be filed anywhere; and there is abundant evidence in the record, not only that he was sworn, but that he made a written affidavit.

The fact that the commissioner made an invalid sale on May 10, 1897, which the court on plaintiff's motion set aside for insufficiency of notice, etc., did not invalidate the sale afterward on June 7th. Nor was the latter sale vitiated by the fact that there was one publication of a notice of sale having the date June 16th, instead of June 7th—there being a sufficient publication after it was amended. Something is said in the appellant's brief about inadequacy of price; but

¹ 7 Am. St. Rep. 146.

that is not one of the grounds of the motion; the evidence introduced on the subject is exceedingly meager, and simple inadequacy of price, even if shown, is not itself sufficient ground to sustain a motion like the one here in question. There are no other points in appellant's briefs which call for special notice.

The notice of appeal from the orders contains also a notice of appeal from the judgment, but the transcript does not contain the record of that appeal, and, as we understand counsel, that appeal is not before us. Therefore, this decision will not be construed as in any way affecting the appeal from the judgment.

The orders appealed from are affirmed.

Temple, J., and Henshaw, J., concurred.

[S. F. No. 1595. Department Two.—December 11, 1900.]

E. J. MIZE, Respondent, v. W. R. HEARST Appellant.

NEW TRIAL—EXCESSIVE DAMAGES—SUPPORT OF VERDICT UPON APPEAL.

—An appellate court is not warranted in setting aside the verdict of a jury and granting a new trial merely on the ground of excessive damages, unless the amount of damages assessed is so unreasonably large and extravagant as to show that the jury were actuated by passion, prejudice, or corruption.

ID.—DAMAGES FOR LIBEL.—A verdict of two thousand six hundred and fifty dollars against a newspaper for the publication of a libel, held not excessive.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

W. H. L. Barnes, for Appellant.

J. C. Bates, for Respondent.

THE COURT.—Action to recover damages for the publication of a libel by defendant in his newspaper, the “Examiner.” The jury returned a verdict for plaintiff in the sum of two thousand six hundred and fifty dollars, for which amount judgment was rendered. Defendant appeals from the judgment and from an order denying his motion for a new trial.

No exception is taken to any ruling of the court below at the trial, nor is any alleged error of law presented; and the sole point made here for the reversal is that the amount of the damages found by the jury is excessive. But, on well-settled principles, an appellate court is not warranted in setting aside the verdict of a jury on this ground, unless the amount of damages assessed is so unreasonably large and extravagant as to show that the jury were actuated by passion, prejudice or corruption; and it is sufficient to say that the record here does not show such a case.

The judgment and order appealed from are affirmed.

[S. F. No. 1450. Department One.—December 12, 1900.]

COUNTY OF SAN MATEO, Respondent, v. LOREN COBURN, Appellant.

EMINENT DOMAIN—PUBLIC USE—JUDICIAL QUESTIONS.—The question whether the uses for which property is sought to be taken, in the exercise of eminent domain, are in fact public is a judicial question, to be determined by the court; and if it can be shown that the end sought is solely for private purposes, condemnation must be denied.

ID.—HIGHWAY & PUBLIC USE—BURDEN OF PROOF.—A highway or public road is *prima facie* a public use, for which land may be condemned; and if it would be claimed otherwise in any particular case, or that the road is in fact for private use, the burden of showing such fact rests upon the contestant.

ID.—NECESSITY—INSTRUMENTALITIES—EXTENT OF RIGHT—POLITICAL AND LEGISLATIVE QUESTIONS.—Where the use is in fact public, the necessity or expediency of taking private property therefor, the instrumentalities to be used, and the extent of the right to be delegated are political and legislative questions.

ID.—DEMAND FOR AND LOCATION OF HIGHWAY—EXCLUSIVE JURISDICTION OF SUPERVISORS.—Whether a public highway is demanded in any particular region, as well as its location and extent, are questions referred by the legislature to the board of supervisors; and where the board, by taking proper steps under the law, has acquired jurisdiction to determine those questions, its jurisdiction is exclusive, and its determination is not subject to collateral attack or to review by the courts.

ID.—DAMAGE TO LAND NOT TAKEN—DEDUCTION FOR BENEFITS—ACTION BY COUNTY.—In an action by a county to condemn private property for a public highway, damages to the land not taken must be allowed without any deduction for benefits to such land by the opening of the road.

ID.—COMPENSATION IRRESPECTIVE OF BENEFIT—CONSTRUCTION OF CONSTITUTION—COUNTY NOT A "MUNICIPAL CORPORATION."—A county is a governmental agency or a political subdivision of the state, and if it be a corporation, it is a political corporation, and is not a "municipal corporation" within the meaning of section 14 of article I of the constitution, which declares that "no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court, for the owner, irrespective of any benefit from any improvement proposed by such corporation."

ID.—ERRONEOUS JUDGMENT—ORDER FOR POSSESSION—REVERSAL UPON APPEAL.—Where the final judgment for damages must be reversed for error in not allowing sufficient compensation, an order for possession of the property sought to be condemned resting upon the erroneous judgment must also be reversed.

APPEAL from a judgment of the Superior Court of San Mateo County, from an order denying a new trial, and from an order authorizing possession. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Joseph H. Skirm, for Appellant.

Henry W. Walker, District Attorney, and George C. Ross, for Respondent.

HARRISON, J.—The plaintiff seeks to acquire by condemnation a right of way over certain lands of the defendant for a public road. It is shown by the complaint that a sufficient petition for laying out a public road was presented to the board of supervisors of the plaintiff, and that viewers were thereupon appointed, and that their report was after-

ward approved by the board, and the amount of damage that would be sustained by the defendant was ascertained and declared and by order awarded to him; that the amount so awarded was set apart for him in the county treasury and notice thereof given to him, and that he did not accept the same within ten days thereafter; that thereupon the board of supervisors by an order directed that proceedings be instituted by the district attorney to procure the right of way under the provisions of the Code of Civil Procedure. The defendant in his answer denied the necessity of a right of way over his lands for any public use, or that the laying out or opening of a public road on said lands is a public necessity, and in addition thereto, claimed that he would sustain damage much greater in amount than had been awarded by the supervisors. The cause was tried by the court and findings made in accordance with the allegations of the complaint, and that the value of the land taken for the road and the improvements thereon was eight hundred dollars. The court also found that the benefits which the defendant would receive from the opening of the road would be equal to the damage occasioned thereby to his remaining land. Judgment was thereupon entered in favor of the defendant for eight hundred dollars, and for the condemnation of a right of way over his lands as set forth in the complaint. The plaintiff paid into court for the use of the defendant the amount of the judgment, and the court thereupon entered its judgment of final condemnation of said land for the purposes of a public highway. Defendant gave notice of a motion for a new trial, and while said motion was pending the court, upon motion of the plaintiff, made an order that, upon the payment into court of a further sum of money as a fund to compensate the defendant, the plaintiff might take possession and use the land so condemned until the final adjudication of the controversy. The defendant's motion for a new trial was denied, and he has appealed from this order and also from the decree of confirmation, and from the order permitting the plaintiff to enter into possession of the land.

At the trial, when the plaintiff rested its case, the defendant moved to dismiss the proceeding upon the ground that no evidence had been offered tending to show that the use

for which the condemnation of his land was sought was a public use. The court denied this motion, and afterward excluded evidence of that character offered by the defendant, and ruled that the only issue to be tried was the value of the lands to be condemned. These rulings are now assigned as error.

1. The right of the state to appropriate private property for public use is an element of sovereignty, and in section 14 of article I of the constitution the people of this state have limited this right by declaring the conditions upon which alone it may be exercised. It is the function of the legislative department to determine, in the first instance, what shall constitute a public use, and whether any private property shall be taken for such use, as well as the extent to which such property may be taken, and in section 1237 et seq. of the Code of Civil Procedure, the legislature has enumerated certain public uses for which the state may exercise its eminent domain, as well as the manner and extent of its exercise for those uses. It is not to be held, however, that the mere declaration by the legislature that the object for which private property may be taken is a public use will preclude the owner from contesting the right to deprive him of his property. If it is sought to condemn the property for a use which is evidently private, or to accomplish some purpose which is not of a public character, courts will disregard the legislative declaration that such use is public. The declaration by the legislature is entitled to great consideration, and if the purpose for which the condemnation is sought is clearly for a public use, or one which in ordinary acceptation or experience expresses a public use, it will be conclusive upon the judiciary (*Stockton etc. R. R. Co. v. Stockton*, 41 Cal. 175); but, if it is clear that it is for a private purpose, the legislative declaration will be of no avail. (*Consolidated Channel Co. v. Central Pac. R. R. Co.*, 51 Cal. 269.) So, too, if it can be shown by extrinsic evidence that the end sought to be accomplished is not of a public character, but is solely for private purposes, the condemnation will be denied as being in excess of the legislative power. (*Matter of Niagara Falls etc. Ry. Co.*, 108 N. Y. 375.) As was said by the court in this case: "It is difficult to make an exact definition of a public use. It is easier to define it by negation than by affirmation"; and in

another portion of the same opinion: "The general principle is now well settled that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used, and the extent to which such right shall be delegated, are questions appertaining to the political and legislative branches of the government, while, on the other hand, the question whether the uses are in fact public, so as to justify the taking *in invitum* of private property therefor, is a judicial question to be determined by the courts." (See, also, Lewis on Eminent Domain, sec. 158.)

There is no room in the present case for any question as to the character of the use for which the condemnation of the land is sought. It needs no argument to show that a highway or public road is a public use. (See Lewis on Eminent Domain, sec. 166.) If it would be claimed otherwise in any particular case, or that the road is in fact for a private use, the burden of showing such fact rests upon the contestant.

Whether a public highway is demanded in any particular region, as well as its location and extent, are also matters of a political or legislative character. (*Wulzen v. Board of Supervisors*, 101 Cal. 15¹; *County of Siskiyou v. Gamlich*, 110 Cal. 94; Lewis on Eminent Domain, secs. 238, 239.) In the Political Code of this state, sections 2681 et seq., the legislature has established a tribunal for determining these questions, and has provided for notice to all persons interested therein, and given them an opportunity to be heard. If this tribunal proceeds in accordance with the provisions of these sections, it acquired jurisdiction to determine these questions, and its determination is not subject to collateral attack. In a proceeding thereafter by the public to condemn a right of way for this public road, the court is not authorized to review the action of the board of supervisors in determining these questions. The provision in section 2690 of the Political Code, that the suit for condemnation "shall be determined by the court or jury in accordance with the rights of the respective parties, as shown in court independent of said proceedings before said board," is not to be construed as au-

¹ 40 Am. St. Rep. 17.

thorizing the court to review the determination of the board of supervisors as to the proper location of the highway, or the propriety or necessity of establishing it. The clause is not without ambiguity, but full effect is given to its provisions by holding that after the suit for condemnation has been brought, the court, in determining the rights of the parties thereto, shall disregard any "informalities" which may have occurred in the proceedings before the board. If it had been the intention of the legislature to establish a different rule upon this subject from that which had previously existed, it is reasonable to suppose that it would have expressed such intention distinctly and in unambiguous terms.

2. The court, however, erred in failing to determine the amount of damages that the opening of the road would cause to the lands of the defendant not taken for the road. The defendant testified that damage would be caused to the remainder of his lands by such opening, and the finding of the court that the benefits which the other portion of his lands would receive from the opening of the road are equal to the damages occasioned by its severance, implies that some damage would be caused thereby. The constitution, article I, section 14, declares that "no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner irrespective of any benefit from any improvement proposed by such corporation." It is unnecessary to determine whether a county is a "corporation" within the meaning of this clause, since, if this be conceded, it is a corporation "other than municipal." A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government. It was held in *People v. McFadden*, 81 Cal. 489,² that under the constitution of this state a county is not a municipal corporation, but, if it may be regarded as a corporation at all, it is but a "political corporation." (See, also, *People v. Sacramento County*, 45 Cal.

² 15 Am. St. Rep. 66.

692; *State v. Leffingwell*, 54 Mo. 458; *Sharp v. Contra Costa County*, 34 Cal. 284; *Askew v. Hale County*, 54 Ala. 639³; *Hamilton County v. Mighels*, 7 Ohio St. 109; *Woods v. Colfax County*, 10 Neb. 552; *Stermer v. La Plata County*, 5 Colo. App. 379; Dillon on Municipal Corporations, sec. 22.)

3. As the error of the court in determining the amount of damages necessitates a reversal of the judgment, the order permitting the plaintiff to take possession of the land sought to be condemned must also be reversed. A final decree of condemnation can be made only after full compensation has been made to the owner, or ascertained and paid into court for him, and, as the order for possession pending the appeal must have this final decree for its foundation, it must fall with the reversal of the decree.

The judgments and orders appealed from are reversed.

Garoutte, J., and Van Dyke, concurred.

Hearing in Bank denied.

Beatty, C. J., dissenting from the order denying a hearing in Bank, and filed the following opinion on the 12th of January, 1901:

BEATTY, C. J.—I dissent from the order denying a rehearing. A county, within the meaning of section 14 of article I of the constitution, is either a municipal corporation or it is not corporation at all, and in either case is entitled in condemning a right of way to set off benefits against damages. (*Moran v. Ross*, 79 Cal. 159; *Moran v. Ross*, 79 Cal. 549.) In my opinion, a county is a municipal corporation within the meaning of this clause of the constitution, and the decision in *People v. McFadden*, 81 Cal. 489,⁴ that it is not a municipal corporation, within the meaning of another provision (i. e., the prohibition of the creation of municipal corporations by special laws), is not inconsistent with this view. The term "municipal corporation" has a broad sense and a restricted sense, and it is used in these different senses in the two clauses of the constitution. In one it comprehends counties and in the other it does not.

³ 25 Am. Rep. 730.

⁴ 15 Am. St. Rep. 66.

[L. A. No. 808. Department One.—December 14, 1900.]

W. T. CURL, Respondent, v. ELLEN J. CURL, Appellant.

DIVORCE—EXTREME CRUELTY—EVIDENCE—APPEAL.—In an action for a divorce, brought by the husband, on the ground that certain alleged conduct of his wife, with respect to her intimate association with another man, had caused him grievous, mental anguish, the question whether her conduct had such effect is one of fact for the trial court; and on an appeal from a judgment in his favor, taken without any bill of exceptions, and without any findings, the supreme court must presume that there was evidence sufficient to support the allegations of the complaint.

APPEAL from a judgment of the Superior Court of Los Angeles County. W. H. Clark, Judge.

The facts are stated in the opinion of the court.

Walter Bordwell, for Appellant.

Diehl & Chambers, for Respondent.

HARRISON, J.—The plaintiff brought this action against the defendant for a divorce, and set forth in his complaint certain conduct by her which he alleged had caused him great suffering and grievous mental anguish. The conduct with which the defendant was thus charged was that she had at a certain date clandestinely visited the house and home of another man during the absence of his family, and had secretly remained there with him for more than one hour, and had at divers other times secretly and clandestinely met him, and in company with him gone to places unknown to the plaintiff, and had remained away for several hours, and that he had at divers times visited the home of the plaintiff and defendant during the absence of the plaintiff, and while the defendant was alone, and upon each of said occasions had remained in said house in company with the defendant alone for several hours. The defendant made no answer to the complaint, but suffered default, and after hearing proofs of

the matters alleged the court granted the divorce. The present appeal is taken from this judgment without any bill of exceptions.

Whether the conduct of the defendant, as above set forth in the complaint, caused the plaintiff grievous mental anguish was a question of fact to be determined by the court from the testimony before it at the hearing. (*Barnes v. Barnes*, 95 Cal. 171; *Fleming v. Fleming*, 95 Cal. 430; *Andrews v. Andrews*, 120 Cal. 184.) The evidence before the trial court is not before us, and, as there are no findings of fact, it must be assumed in support of the judgment that the evidence was sufficient to support the allegations of the complaint, and that the court found therefrom that the conduct of the defendant had caused the plaintiff grievous mental anguish. If so, she was guilty of extreme cruelty and the judgment was correct.

The judgment is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[S. F. No. 1654. Department Two.—December 14, 1900.]

JOSEPH NAPHTALY et al., Respondents, v. STEFANO
ROVEGNO et al., Appellants.

JURY TRIAL—PARTITION—FAILURE TO DEPOSIT JURY FEES—WAIVER.—

A defendant in an action of partition, which had been on the trial calendar for several weeks prior to the time at which it was actually tried, marked as a court as distinguished from a jury case, in accordance with the custom of the court, and which at the time it was first called for trial had been answered as "ready," without any request for a jury, is not entitled to a jury merely because he demands it at the time of the trial, in the absence of an offer by him to deposit the jury fees, as required by a rule of the court.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a new trial. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

James A. Devoto, and Devoto & De Martini, for Appellants.

Naphtaly, Freidenrich & Ackerman, for Respondent.

McFARLAND, J.—This is an action for a partition of certain described land. The defendants, Rosa Rovegno and Jiacoma Rovegno, appeal from an order denying their motions for a new trial. The only point which they insist on for a reversal of the order is that the court below erred in denying their demand for a jury.

Whether or not certain issues in the case were of such a character as to give to appellants the general right to have them tried before a jury is a question not necessary to be here determined; for we think that the court, for specific reasons hereinafter mentioned, did not err in refusing the demand.

The case was tried on the 20th of October, 1896, but it had been on the trial calendar several weeks prior to that time, marked as a court case as distinguished from a jury case in accordance with the custom of the court. This fact was well known to the parties, and appellants never asked to have it changed from "court" to "jury," and had not demanded a jury until the said 30th of October. On the latter day, when the case came on regularly to be tried, one of the defendants, Stefano Rovegno, moved for a continuance, and, the motion having been denied, demanded a jury, and the demand was denied. Then these appellants, who had not joined in the motion for a continuance, also demanded a jury and their demand was refused. On September 20th the case had been called for trial, and appellants had answered "ready" without any intimation that they desired a jury; but, owing to the number of cases before it on the calendar, it was not reached until October 20th, at which time there was no jury in attendance. The record, at this stage, merely shows the naked facts that appellants made a demand for a jury and that the court denied it; nothing further appears. But in another part of the record it is shown that there was a rule of court providing that "a party demanding a jury shall before the commencement of the trial deposit with the clerk of the court the fees necessary therefor"—specifying the amount;

and appellants did not make nor offer to make such deposit. In *Adams v. Crawford*, 116 Cal. 495, it was held that such a rule is reasonable and must be complied with. Under these circumstances, it does not appear that the court erred in denying the demand for a jury, and such denial does not therefore warrant a new trial.

The order appealed from is affirmed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank, and filed the following opinion thereon on the 14th of January, 1901:

BEATTY, C. J.—I dissent from the order denying a rehearing.

The appellants claimed that the issues raised by their answer were properly triable by jury. When the cause was first entered upon the trial calendar of the superior court there was a controversy between plaintiffs and defendants as to whether it was a court or jury case, and that court, holding with the plaintiffs, marked it as a court case. In that condition it remained on the calendar until, previous cases being disposed of, it was called for trial. The appellants did not then ask for a continuance, but they renewed their demand for a jury trial, supporting their demand by an argument in which they attempted to show that the nature of the issues to be tried entitled them to a jury. Nothing was said about the deposit of a jury fee, and it is perfectly manifest from the record that the rule of the superior court in respect to that matter was never considered as having any bearing upon the point to be decided. The ruling of the court denying a jury trial was based simply and solely upon the ground that the defendants were not entitled to a jury, and, this ruling being made, it would have been a perfectly vain and useless act to deposit or tender the jury fee. The rule merely requires the jury fee to be deposited by the party demanding a jury before the commencement of the trial, and if a jury

trial is denied in advance the rule can have no operation. Besides, the party making the demand has all the time before the commencement of the trial to make his deposit. Here, when the demand was made, there was no jury in attendance, and the trial by the court to which the defendants were forced began and ended before it was possible for a jury trial to have commenced. For these reasons I think the failure of defendants to deposit or offer the jury fee is no answer to their position.

It is quite as clear that they did not waive their right to a jury by any of the proceedings referred to in the Department opinion. There can be no waiver of a jury except in one of the three modes enumerated in section 631 of the Code of Civil Procedure. (*Swasey v. Adair*, 88 Cal. 179, 183; *Biggs v. Lloyd*, 70 Cal. 447.)

If these conclusions are correct, the appeal has been disposed of by an erroneous decision, of the only point considered in the opinion of the Department, and the serious and important question in the case—the question decided in the superior court and the question most elaborately argued by counsel here—is left untouched. I think it called for a decision, and that the appeal should not have been disposed of without a decision.

[Crim. No. 635. In Bank.—December 14, 1900.]

THE PEOPLE, Respondent, v. HARRY W. CLARKE,
Appellant.

CRIMINAL LAW—MURDER—EVIDENCE.—In a prosecution for murder the evidence although purely circumstantial, is reviewed and held amply sufficient to sustain a conviction.

Id.—CHARACTER OF SHOTS.—Where the homicide is shown to have been committed inside of a house, by the shooting of the deceased with a shotgun, a witness for the prosecution, who was outside the house at or about the time the shooting is claimed by the prosecution to have occurred, and who testified to the fact of having then heard shots, may further testify that from the sound of the shots

they were made in the house, and sounded like a shot fired from a shotgun. The fact that such witness was not an expert cannot be taken advantage of on appeal, in the absence of an objection on that ground at the trial, especially when he testifies to his ability to distinguish by sound between the different kinds of shots.

ID.—IDENTITY OF PLACE.—Where a witness for the prosecution has testified that he was at a particular place when he heard the shots fired, and that a few minutes thereafter he saw the defendant come out of the house, and evidence is offered by the defense that the house was not visible from that place, the witness in rebuttal may testify that he pointed out to other witnesses for the prosecution the place where he was when he heard the shots, and such other witnesses may then testify that the house was visible from the place so pointed out.

ID.—EVIDENCE OF NONKILLING BY ANOTHER.—Where the evidence shows conclusively that the deceased must have been killed either by the defendant or by another person, the latter may testify that he did not do it.

ID.—EVIDENCE TENDING TO DEGRADE DEFENDANT.—To ask the defendant on cross-examination, while a witness in his own behalf, whether at the time of the homicide he was living with a woman who was not his wife is prejudicially objectionable. Such objection is cured, however, if the defendant's own witnesses testify to the same effect.

ID.—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—The order denying a new trial in this case, on the ground of newly discovered evidence, will not be disturbed on appeal.

ID.—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—REASONABLE DOUBT.—An instruction "that if one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong," and that if the jury "have a reasonable doubt as to which of said conclusions the chain of circumstances leads," they should acquit the defendant, is properly refused, as both of such opposing conclusions might lead to defendant's guilt.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial.
B. N. Smith, Judge.

The facts are stated in the opinion of the court.

D. Allen, and W. H. Shinn, for Appellant.

Tirey L. Ford, Attorney General, and C. N. Post, Assistant Attorney General, for Respondent.

GAROUTTE, J.—The defendant has been convicted of the crime of murder of the second degree, and appeals to this court.

It is earnestly insisted that the evidence does not warrant a conviction. The evidence was purely circumstantial, and the salient facts are these: One Joseph Hunter, a constable, lived in a four-room house near the public road, some three miles distant from the city of Los Angeles. The defendant, a young man of slight physique and weight, afflicted with a perceptible lameness in one leg, had been living with Hunter for some weeks. Upon the day of the killing Hunter was in the city of Los Angeles, the defendant being alone at the house. During the early part of the day the defendant borrowed a shotgun of one neighbor and four loaded shells of another, stating his purpose was to shoot squirrels; and during the early afternoon he undoubtedly fired two of these shells at squirrels near the house. Between 5 and 6 o'clock of this day, a Chinese laundryman drove up to the house for the purpose of delivering laundry, as was his usual weekly custom. He went into the house with the laundry and never came out. His horse stood in front of the house for an hour or more, and then wandered away aimlessly down the road. Upon the following morning suspicion of murder became rife in the neighborhood, and upon the third or fourth day thereafter the dead body of the Chinaman was found concealed beneath the floor of the house. Death had resulted from two shotgun wounds inflicted with the borrowed gun and two of the borrowed shells. At some time between the hours of 5 and 6 o'clock of this day, and after the Chinaman had entered Hunter's house, one witness heard two shotgun shots, apparently coming from within the house, and other witnesses heard at least one shot coming from the same direction. Two bed sheets, evidently taken from defendant's bed, were found wrapped around the head and shoulders of the dead man. Spots of blood were found at various points in the house, and evidence of an attempt to conceal and erase them was apparent. Indeed, there is no question but that the Chinaman was killed in the house by gunshot wounds inflicted with the borrowed gun and shells. Defendant made

many false statements when questioned by the officers after the killing, and also made a bold effort to escape from their custody. He was seen at the house by one witness a few minutes after the two shots were heard, although he claims to have left the house soon after the Chinaman had entered it, and not to have returned until an hour or two later. About 10 or 11 o'clock of that night at the house he showed a woman friend considerable silver money; and the theory of the state is that the purpose of the killing was robbery. Hunter returned to his house drunk at some time between 7 and 8 o'clock of that night. There are other items of evidence looking toward defendant's guilt which it is not necessary to here detail. If the Chinaman was killed between the hours of 5 and 6 o'clock of that afternoon, or even as late as 7 o'clock, the defendant's guilt is well assured, and that the gunshots heard by the aforesaid witnesses as coming from the direction of the house caused the death of the Chinaman is equally well assured. There were but four loaded shells for the gun, and two of these shells had been fired early in the afternoon at squirrels. The remaining two shells were the shells used in the killing. Defendant by his counsel claims that Hunter killed deceased, but that theory is confronted with the fact that Hunter did not return to his house until after 7 o'clock at least, and the two shots from the gun, as testified to by the witnesses, must have been fired previous to that time. While the fact cannot be considered upon the question of the sufficiency of the evidence to support the verdict, still it may be mentioned that the correctness of the jury's disbelief in the evidence of defendant as to his alibi was subsequently impregably forfeited by his own affidavit introduced upon his motion for a new trial, wherein, under oath, he admitted his testimony at the trial was false, and stated that he was present at the killing, and saw Hunter fire the shots that killed the deceased, and subsequently stood by when Hunter concealed the dead body. We have given the salient facts disclosed by the record. In addition to these, there are many others of minor importance, and, taking them altogether, we are prepared to say that the verdict of the jury has full support in the evidence.

A witness under objection was asked the following question: "Q. Could you tell from the sound of the shots about

where they were, whether they were in the house or out of the house?" The objection was properly overruled. (*People v. Chin Hane*, 108 Cal. 597.) The witness was also justified in testifying that the shots sounded like those fired from a shotgun. Even if it be conceded that this evidence should only come from the mouth of an expert, still there was no objection to the question upon that ground, and the witness also stated that he was able to distinguish by the sound the difference between shots fired from a shotgun and those fired from a rifle.

The witness Le Page testified that he was sitting upon a rock several hundred feet from Hunter's house when he heard the shots fired, and that a few minutes thereafter he saw defendant come out of the house, look into the wagon of the Chinaman, and then return into the house. The defendant offered evidence to the effect that a person sitting on the rock described by the witness could not see Hunter's house. The location of this particular rock, therefore, became very material; and in rebuttal Le Page testified that he pointed out to the state's witnesses the rock upon which he was sitting when he saw defendant at the house. These witnesses then testified that the house could be seen from the rock pointed out by Le Page. We see no valid objection to this line of testimony.

There was no error committed by the court in allowing the prosecution to prove by Hunter that he did not kill the Chinaman. It may be said the evidence points with unerring certainty to the fact that either the defendant or Hunter killed the Chinaman. Indeed, counsel for defendant all through the trial of the case claim that deceased must have been killed by Hunter. Under these circumstances the testimony of Hunter was competent and admissible. (*People v. Van Horn*, 119 Cal. 323, 328.)

The defendant when on the witness stand was asked in regard to one Miss Letitia Allec: "Q. You were living there with her, was you not?" The question was clearly objectionable, and clearly prejudicially objectionable. An attorney cannot degrade or impeach a witness in this way. Under almost any circumstances, other than those here presented, this error would demand a reversal of the judgment and a new trial of the defendant. This court has held questions of this character prejudicially objectionable so many times in

the past that it is surprising the state's officers will continue to indulge in the practice of asking them. In the very recent case of *People v. Crandall*, 125 Cal. 135, the whole matter is fully discussed and the authorities cited. But in view of the fact that other evidence of the same general tenor was introduced upon the part of the defendant, we think it apparent that the error committed by the trial court in the admission of the answer to this question did not prejudice him. The record discloses by the evidence of defendant's witnesses that this woman had been living a portion of her time prior to the killing at Hunter's house with defendant. The woman herself testified in answer to defendant's counsel: "About two weeks before the shooting I remember riding from the city with Joe Hunter toward his place. At that time and between the city and his place, on the road, he said to me, 'Why don't you get rid of Harry? He hasn't got any money, and if you get rid of him, I will give you all the money and fine clothes you want.' He also said on the same occasion that Harry was no good only for his good looks." And upon cross-examination she says: "Joe Hunter didn't say to me that I had better marry Clark. He wanted me to quit Harry and go with him. That is all."

Defendant made a motion for a new trial upon the ground of newly discovered evidence, and in support of his motion presented many affidavits. He himself made an affidavit to the effect that his testimony bearing upon his claim of an alibi was false, and that he was present in the house and saw Hunter kill the Chinaman and subsequently conceal the body. As tending to furnish statutory grounds for a new trial, we attach no importance whatever to this affidavit. The court below evidently had but little doubt of its falsity. Indeed, it appears by the record that subsequent to defendant's conviction Hunter was tried for the murder of the Chinaman and acquitted, the jury evidently not believing defendant's testimony, which was in line with his affidavit here under consideration. We have also examined the contents of the other affidavits introduced by him as showing newly discovered evidence. As to some of them, for example that of Anna Bibby, it may well have impressed the trial court as being entirely unbelievable. Others contain matters of minor

importance, and still others set out matters of an entirely cumulative character. In view of the law by which this court is governed in reviewing a question of this character, we will not disturb the order denying the new trial upon the ground of newly discovered evidence. (*People v. De Masters*, 109 Cal. 607.) We do not find it necessary to pass upon the admissibility of certain counter-affidavits offered by the state upon the hearing of the motion.

Complaint is made of the court's refusal to give the following instruction: "The court instructs the jury that if one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong; and therefore in such a case, if you have a reasonable doubt as to which of said conclusions the chain of circumstances leads, a reasonable doubt would thereby be created, and you should give the defendant the benefit of such doubt and acquit him." In view of the fact that both of these "opposing conclusions" might lead to defendant's guilt, the instruction for this reason alone was properly refused.

There is no substantial error disclosed by the record.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., McFarland, J., Harrison, J., and Henshaw, J., concurred.

Rehearing denied.

[S. F. No. 1637. Department One.—December 14, 1900.]

PORTLAND CRACKER COMPANY, Respondent, v. A. H.
MURPHY, Appellant.

ACTION FOR MONEY FRAUDULENTLY APPROPRIATED—PRAYER FOR IMPRISONMENT—GENERAL AND SPECIAL FINDINGS—MONEY JUDGMENT. Under a complaint alleging fraudulent appropriation of plaintiff's money received by defendant as plaintiff's agent and clerk, and praying judgment for defendant's imprisonment until it is paid, a general finding in favor of the defendant for a less sum is not inconsistent with a special finding against the alleged fraud, and a money judgment may be entered upon such findings, without judgment for imprisonment.

ID.—INSTRUCTIONS CONSTRUED TOGETHER—BURDEN OF PROOF—VERDICT NOT AGAINST LAW.—The instructions are to be construed together as a whole, and where, so construed, they import that plaintiff has the burden of proof upon the whole case, and must win or lose accordingly, but that the verdict may be against him upon the issue of fraud, if he fails to prove it, and yet may be for him upon the money demand, if money had and received by defendant to plaintiff's use is proved, a verdict against the fraud and for a money demand is not against law, although it may be seemingly inconsistent with part of the instructions taken separately.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Charles W. Slack, Judge.

The facts are stated in the opinion of the court.

Grove L. Johnson, John H. Hansen, and Garret W. McEnerney, for Appellant.

Crittenden Thornton, F. H. Merzbach, J. F. Riley, and Charles H. Jackson, for Respondent.

VAN DYKE, J.—The complaint alleges that the defendant embezzled and fraudulently misapplied and converted to his own use the sum of twelve hundred and seventy-one dollars and ninety-four cents, which had come into his hands in the course of his employment as the agent and clerk of the plaintiff, and the complaint prays that judgment against the defendant may be had in said sum and for costs of suit; and

that the defendant be arrested and held to bail; that judgment may be entered against the person of said defendant; that he be imprisoned until the payment of said sum, and for further relief. Upon the issuance of the summons plaintiff applied for and obtained an order for the arrest of the defendant under section 479, subdivision 2, of the Code of Civil Procedure. The necessary affidavit and undertaking being furnished, the order for arrest was made, and the defendant was thereupon arrested, but was released on the same day upon giving an undertaking as required by section 487 of the Code of Civil Procedure. The answer denies that the defendant embezzled, fraudulently or otherwise misapplied or converted to his own use, the sum of twelve hundred and seventy-one dollars and ninety-four cents, or any other sum which had come into his hands in the course of his employment as the agent or clerk of the plaintiff, or at all. Upon the issues presented the case was tried by a jury, and a general verdict rendered in favor of the plaintiff for the sum of seven hundred and fifty dollars, and also found on the special issue submitted, to wit: "Did the defendant fraudulently appropriate the money of the plaintiff as alleged in the complaint? Answer. No."

Upon the coming in of the verdict the defendant moved the court to enter judgment in his favor upon the ground that the special issue controlled, and that the defendant was entitled to a judgment thereon. The court denied defendant's motion and entered a money judgment in favor of the plaintiff upon the general verdict.

The defendant appeals from the judgment so entered upon a bill of exceptions, and relies for a reversal upon two alleged errors: 1. That upon the verdict the judgment should have been for the defendant; 2. That the verdict is contrary to law in this, that it is contrary to the instructions of the court. The theory of the defendant is that, inasmuch as the plaintiff alleged that the money had been embezzled and fraudulently appropriated, that he cannot recover at all, unless the issue upon such allegation is found in its favor. In this appellant is clearly mistaken. The action is for the recovery of money in the hands of the defendant belonging to the plaintiff, and

whether that money had been embezzled or fraudulently appropriated would not defeat the recovery of a simple money judgment for the amount of money in the hands of the defendant due the plaintiff; but, unless the issue in reference to embezzlement or fraudulent appropriation were found in favor of the plaintiff, it could not recover a judgment for the imprisonment of the defendant until the money found due should be paid, as in this state no person can be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud.

Payne v. Elliot, 54 Cal. 339,¹ was an action for the fraudulent conversion of mining stock. The plaintiff had judgment for the amount of the mining stock so converted, and a further judgment that the plaintiff was entitled to an order of arrest against the defendant until the same should be paid. On appeal it was held "that the court below did not err in overruling the demurrer to the complaint, or in rendering judgment for the plaintiff for the value of the stock and interest thereon from the time of the conversion until the time of the trial, but that the judgment for fraud exceeded the relief to which the plaintiff was entitled by his complaint"; that the averments thereof were not sufficient to support that portion of the judgment. The court below was therefore directed to strike from the judgment the portion in reference to the arrest of the defendant, and, thus modified, the judgment was affirmed.

In *Kullmann v. Greenebaum*, 84 Cal. 98, the plaintiff had a money judgment in the court below, and appealed for the purpose of having the judgment modified by directing the court below to enter judgment in accordance with the facts found by the jury, adjudging the defendants guilty of fraud, and directing process to issue against the person according to law. The court say: "This we decline to do, for the reason that the complaint sets up no fraud by defendants of which plaintiff can complain. . . . It may be conceded that the court was bound to enter judgment on the verdict of the jury, but, under the state of facts above pointed out, the court did not err in disregarding the verdict of the jury in respect of fraud," and affirmed the judgment.

¹ 35 Am. Rep. 80.

Obersteller v. Commercial etc. Co., 96 Cal. 645, is an appeal from a judgment recovered by the plaintiff against the defendant in an action upon a policy of insurance. The answer of the defendant charged fraud on the part of the plaintiff in procuring the policy. In that case there was a general verdict in favor of the plaintiff for the sum of five hundred dollars, and upon the entry of the general and special verdicts defendant moved the court for a judgment for the defendant on the ground that the verdict found fraud upon the part of the plaintiff, which motion was denied; and the court in its opinion says: "The code provides: 'Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.' (Code Civ. Proc., sec. 625.) This proceeding is not authorized in any other case; and the general and special verdicts in this case are entirely consistent. The special verdict finds the total value of the property insured and destroyed to be the sum of five hundred dollars, and the general verdict is for that sum. If in their special verdict the jury had found the value of the property to be less than five hundred dollars, and had rendered a general verdict for that or a greater sum, it would as clearly be within the provision above quoted as it now as clearly is not. All that can now be said is that the jury found that plaintiff's loss was not so great as he represented it to be. That was favorable to the defendant. We think that finding was not conclusively a finding of fraud on the part of the plaintiff. Standing alone, it shows that he overestimated his property. Whether or not that vitiated the policy of insurance was a question not involved in the motion for judgment for the defendant upon the verdict. That motion, as we have before stated, could not be granted on any other ground than the one specified in the code, viz., inconsistency between the general and special verdicts. The motion was properly denied."

In this case the special verdict was not inconsistent with the general verdict. The complaint set forth a cause of action for a money demand, and also set forth facts which, if proven, would have justified a judgment for the arrest and detention of the defendant until the money judgment should be paid. The jury found in favor of the plaintiff on the issue

of the money demand, although not to the amount claimed, and found in favor of the defendant on the issue of the embezzlement and fraudulent appropriation of the money. Clearly, when the defendant had money in his hands belonging to the plaintiff, the plaintiff was entitled to a money judgment, although the defendant may not have been guilty of embezzlement or fraudulent appropriation. And such was the judgment entered in this case.

The appellant contends that the verdict is contrary to law, in that it is contrary to the following instruction: "The plaintiff has the burden of proving the fraudulent appropriation of the money by the defendant while acting as its agent; and the defendant is not required to prove that he did not make such appropriation. If the plaintiff has proved by a preponderance of the evidence that the defendant did make such fraudulent appropriation, then your verdict must be for the plaintiff, not exceeding the amount claimed by it in its complaint. On the other hand, if the plaintiff has failed to do this, your verdict must be for the defendant." But when this instruction is taken in connection with the other instructions, it will be manifest that the meaning of the court was that, if the plaintiff failed to prove the fraudulent appropriation, the verdict should be for the defendant on that issue. In the other instructions the court says: "Should you find a verdict for the plaintiff, you must ascertain the amount of money which the defendant has fraudulently appropriated, and on this amount the plaintiff is entitled to interest at the rate of seven per cent per annum from the time of the conversion fixed in the complaint, to wit, February 12, 1896, up to the present time. Should you find a verdict for the plaintiff, you are requested to answer the following interrogatory: 'Did the defendant fraudulently appropriate the money of the plaintiff as alleged in the complaint?' This interrogatory need not be answered should you find a verdict for the defendant." In other words, in order to find a verdict for the defendant, they would have to find that he had no money in his hands, either fraudulently or otherwise, belonging to the plaintiff; but they could find for the plaintiff on the money demand, and also find for the defendant that the money had

not been fraudulently appropriated; that is to say, simply a finding for the plaintiff as on a demand for money had and received by defendant to the use of the plaintiff.

Judgment affirmed.

Harrison, J., and Garoutte, J., concurred.

[Sac. No. 736. Department One.—December 14, 1900.]

E. L. HAWK, Appellant, v. O. L. BARTON, Respondent.

CONTRACT TO PAY JUDGMENT—ASSIGNMENT OF CONTRACT AND JUDGMENT—ACTION BY ASSIGNEE—STATUTE OF LIMITATIONS.—An action by the assignee of a written contract by which the defendant agreed, in consideration of the transfer of a mine to him by plaintiff's assignor, to pay a judgment against such assignor in favor of a third person, who also assigned the judgment to the plaintiff, does not rest upon the judgment, but upon the written contract, and is not barred by the lapse of five years from the entry of the judgment, if commenced within four years from the date of the contract.

ID.—CONTRACT NOT ONE OF INDEMNITY—ORIGINAL PROMISE.—The contract to pay the judgment in consideration of the transfer of the mine is not one of indemnity, but is an original promise upon which an action may be brought by the owner both of the contract and judgment, without having first, or at all, to look to the judgment debtor.

ID.—ACTION UPON CONTRACT—DEMURRER AS TO LIMITATION OF JUDGMENT—QUESTION NOT PRESENTED.—In an action upon the written contract, to pay the judgment, a demurrer improperly pleading the limitation of five years applicable to an action upon a judgment does not present the question whether the defendant can, by proper plea, urge against his liability on the contract that the judgment was barred before it was assigned to the plaintiff.

APPEAL from a judgment of the Superior Court of Sacramento County. Matt. F. Johnson, Judge.

The facts are stated in the opinion.

White & Seymour, for Appellant.

A. J. Bruner, for Respondent.

CHIPMAN, C.—Action on a contract. Defendant demurred to the complaint for insufficiency of facts, and also for the reason that the action is barred by section 336 of the Code of Civil Procedure. Defendant had judgment, from which plaintiff appeals. The complaint alleges that on May 12, 1890, one Matthew Lennox obtained a deficiency judgment for the sum of six hundred and twenty-eight dollars and sixty-six cents, arising out of a foreclosure suit, against one W. P. Harlow, and that the said judgment is unsatisfied, unpaid, and unreleased; that on May 16, 1893, defendant herein entered into a written contract with Harlow which recites that defendant, on December 12, 1892, had agreed to purchase a certain mine known as the Harlow mine, situated in Placer county, for the consideration of fifteen thousand dollars, and that since said contract of purchase, to wit, on said May 16, 1893, Harlow had delivered to defendant a deed to said mine duly executed and acknowledged. The contract then reads: "Now, as part of the consideration for said deed, the undersigned agrees and binds himself as follows to the said W. P. Harlow: 1. To pay and satisfy a certain judgment in favor of Matthew Lennox against W. P. Harlow for the sum of six hundred and twenty-eight dollars and sixty-six cents, said judgment in superior court of El Dorado county, dated May 12, 1890." The contract then sets forth certain other payments agreed to be made by defendant, not necessary to be stated here. The contract is signed "O. L. Barton." Harlow assigned this contract to plaintiff December 12, 1895. The complaint also avers that Lennox assigned his interest in the judgment to plaintiff on July 7, 1896, and it is alleged that no part of the judgment has been paid, but the whole thereof is due and unpaid; that defendant was notified by plaintiff of said assignments before this action was commenced and demand made upon him to pay and satisfy said judgment, but that defendant refused, and still refuses to pay the same or any part thereof.

There is no brief for respondent, and we are not advised as to the grounds on which the demurrer was sustained. The complaint was filed October 12, 1896, less than four years from the date of the agreement of defendant to pay the judgment.

The five years statute, section 336, relates to judgments,

and we suppose defendant's notion was that the action rested on the judgment and not on the contract. In this we think he erred. The action was founded on a written contract and was not barred. (Code Civ. Proc., sec. 337.) We can only surmise the remaining ground upon which the demurrer was sustained—namely, that the contract was merely one of indemnity. But by its terms it was plainly an agreement to pay and satisfy a certain judgment for a certain sum of money the full consideration for which defendant had received. Plaintiff is the owner and holder of both the judgment against Harlow and the agreement of Barton to pay it. Plaintiff may look to defendant, whose performance would have the effect to discharge the judgment; he is not bound to look first, or at all, to Harlow, the judgment debtor, for he holds Barton's written agreement executed for a good and valuable consideration to pay this judgment.

Whether Barton can by proper plea show that he is discharged from liability on his contract for the reason that the judgment against Harlow was barred when assigned to plaintiff is a question not raised by the demurrer since the action is on Barton's contract, and not on the Lennox-Harlow judgment, and the only statute pleaded is that relating to judgments.

We advise that the judgment be reversed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed. Van Dyke, J., Garoutte, J., Harrison, J.

[S. F. No. 1521. Department One.—December 14, 1900.]

GRIFFITH COIT et al., Appellants, v. WESTERN UNION
TELEGRAPH COMPANY, Respondent.

TELEGRAPHS—MISTAKE IN MESSAGE—CARE AND DILIGENCE—CONSTRUCTION OF FINDING.—In an action for damages caused by a mistake in a telegraphic message sent in reply to a message from the plaintiff, a finding that the telegraph company was not guilty of gross or any degree of negligence in the transmission and delivery of the message, or in the error or mistake therein, is to be construed as equivalent to an express finding that the company used great care and diligence in its transmission and delivery, in pursuance of section 2162 of the Civil Code.

ID.—STIPULATION IN REQUESTED MESSAGE—LIMITATION OF LIABILITY—UNREPEATED MESSAGE—PARTIES BOUND BY CONTRACT.—A stipulation in the message transmitted to the plaintiffs in answer to their request therefor, limiting the liability of the telegraph company for mistakes or delays in transmission of an unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, is valid and binding equally upon the sender and receiver of such message, in the absence of proof or willful misconduct or gross negligence of the telegraph company in the performance of its duty.

ID.—AGENCY OF SENDER FOR RECEIVER.—The sender of the message in response to a message from the plaintiffs was the agent for the plaintiffs in sending it, and the plaintiffs receiving the message are bound by the contract of the sender with the telegraph company as principal.

ID.—PRIVITY OF CONTRACT—CAUSE OF ACTION IN TORT.—The addressee of a message, where there is no privity of contract, may rest his action upon tort for a breach of public duty by the telegraph company; but in a case where he is party to a special contract, either directly or indirectly through the sender as his agent, in an action against the company he must stand upon his contract rights.

ID.—ABSENCE OF MISCONDUCT OR GROSS NEGLIGENCE—MISTAKE CAUSED BY ATMOSPHERIC DISTURBANCE.—Where it appears that there was no willful misconduct, and that the mistake complained of was caused in an unrepeated message requested by the plaintiffs, by reason of atmospheric disturbance during a prevailing storm, causing the line to work badly, the line being otherwise in good working order, when the message was sent, a finding that there was no gross negligence in the sending of the message will not be disturbed for insufficiency of evidence.

ID.—DUTY OF TELEGRAPH COMPANY—PRESENCE OF STORM.—It was the duty of the telegraph company to forward the telegram at the earliest practicable moment; and the fact that a storm was prevailing over the route and that the action of the elements upon the wire could not be overcome by care and diligence, does not of itself convict the telegraph company of gross negligence in sending the message during such storm, and in not waiting for climatic changes for the better before sending it.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. W. T. Wallace, Judge.

The facts are stated in the opinion of the court.

Crittenden Thornton, and F. H. Merzbach, for Appellants.

The telegraph company was bound to use great care and diligence in the transmission and delivery of messages. (Civ. Code, sec. 2162; *Hart v. Western Union Tel. Co.*, 66 Cal. 579.¹) An action will lie in favor of the receiver of a message for negligence or mistakes in transmission. (3 Sutherland on Damages, 314; Shearman and Redfield on Negligence, 560; *Western Union Tel. Co. v. Du Bois*, 128 Ill. 248²; *West v. Western Union Tel. Co.*, 39 Kan. 93³; *May v. Western Union Tel. Co.*, 112 Mass. 90; *Western Union Tel. Co. v. Allen*, 66 Miss. 549; *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403; *Young v. Western Union Tel. Co.*, 107 N. C. 370⁴; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695⁵; *Western Union Tel. Co. v. Beringer*, 84 Tex. 38.) The addressee is not bound by conditions assented to by the sender. The liability of the company to the addressee arises from breach of its public duty. (*Western Union Tel. Co. v. Du Bois*, *supra*; *De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383; *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298⁶; *Western Union Tel. Co. v. McKibben*, 114 Ind. 511.) The receiver of a message is under no obligation to have it repeated. (*Harris v. Western Union Tel. Co.*, 9 Phila. 88; *Tyler v. Western Union Tel. Co.*, 60 Ill. 421⁷; *De Rutte v. New York etc. Tel. Co.*, 30 How. Pr. 403; 1 Daly, 547.) The

¹ 56 Am. Rep. 119.

² 15 Am. St. Rep. 109.

³ 7 Am. St. Rep. 530.

⁴ 22 Am. St. Rep. 883.

⁵ 6 Am. St. Rep. 864.

⁶ 78 Am. Dec. 338.

⁷ 14 Am. Rep. 38.

telegraph company was bound to delay transmission of the message during the storm. (*Pierce v. Southern Pac. Co.*, 120 Cal. 156; *Salisbury v. Herchenroder*, 106 Mass. 458⁸) The act of God was not the sole cause of the mistake, unmixed with human agency or negligence of the defendant. (*Polack v. Pioche*, 35 Cal. 420⁹; *Forward v. Pittard*, 1 Term Rep. 27, per Lord Mansfield; *McArthur v. Sears*, 21 Wend. 190; *Ewart v. Street*, 2 Bail. 157¹⁰; *Fish v. Chapman*, 2 Ga. 349¹¹; *Merrit v. Earle*, 29 N. Y. 115¹²; *Turner v. Tuolumne, Water Co.*, 25 Cal. 403.)

George H. Fearons, and R. B. Carpenter, for Respondent.

The plaintiff who requested the sending of the message complained of must stand in the shoes of the sender, and is bound by the contract limiting the liability of the defendant. (*Ellis v. American Tel. Co.*, 95 Mass. 226, 238.) The company was bound to transmit the message promptly, or suffer a penalty for neglect. (U. S. Rev. Stats., sec. 5269.) The stipulation was valid and binding upon the parties. (*Hart v. Western Union Tel. Co.*, 66 Cal. 579¹³; *Redington v. Pacific Postal Tel. etc. Co.*, 107 Cal. 317¹⁴; *Primrose v. Western Union Tel. Co.*, 154 U. S. 1; *Smith v. New York Cent. Ry. Co.*, 24 N. Y. 222; *Riley v. Western Union Tel. Co.*, 109 N. Y. 231; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299¹⁵; *Clement v. Western Union Tel. Co.*, 137 Mass. 463; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 240; *United States Tel. Co. v. Gildersleve*, 29 Md. 232¹⁶; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *McAndrew v. Electric Tel. Co.*, 17 Com. B. 3.)

GAROUTTE, J.—Plaintiffs telegraphed to W. B. Dennis, at St. Louis, asking him to telegraph them the lowest cash price for two hundred and twenty tons of forty-pound steel rails. The message was correctly delivered, and in answer thereto Dennis telegraphed to plaintiffs the price to be thirty-seven dollars per ton. This dispatch was delivered in due

⁸ Am. Rep. 354.

⁹ 95 Am. Dec. 115.

¹⁰ 23 Am. Dec. 131.

¹¹ 46 Am. Dec. 393.

¹² 86 Am. Dec. 292.

¹³ 56 Am. Rep. 119.

¹⁴ 48 Am. St. Rep. 132.

¹⁵ 18 Am. Rep. 485.

¹⁶ 96 Am. Dec. 519.

time, but when delivered it read twenty-seven dollars per ton, the mistake in the message having occurred in transit by reason of atmospheric disturbances. Relying upon the words of the message as delivered, plaintiffs entered into contracts to buy and sell steel rails, and great damage resulted to them by reason of the mistake of defendant, heretofore stated. To recover this damage the present action was brought.

The facts of the case are largely agreed upon, and in addition, the court made a finding of fact as follows: "The defendant, Western Union Telegraph Company, was not guilty of gross or any other degree of negligence in the transmission of the message of Dennis to the plaintiffs, nor was the error or mistake in the said dispatch of said Dennis, as the same was delivered to said plaintiffs, due to or caused by the gross or any other degree of negligence of the said defendant, Western Union Telegraph Company." Upon the facts judgment was rendered for defendant, and this appeal from the judgment and order denying a motion for a new trial is now before us. This finding in favor of defendant of no negligence is essentially a finding of the ultimate fact in the case, and will be so treated by the court in the consideration of the merits of this appeal.

The Civil Code, section 2162, declares: "A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages." In many jurisdictions it is held that the phrase "gross negligence" is a misnomer, and that the adjective "gross" in no way qualifies the noun "negligence." But in this state the rule is recognized to the contrary, not only by the decisions of this court, but by many sections of our Civil Code. The phrases "gross negligence" and "slight negligence" are found in common use in the law of this state, and, being so used, each must be held to have a distinctive meaning. The defendant in this case was required to use great care in the transmission and delivery of this message. The court found that in the transmission and delivery of the message defendant was not guilty of any negligence. Not being guilty of any negligence whatever, defendant must be held to have used great care; and the finding of fact quoted is the equivalent of an express finding that defendant used great care in the performance of its

duty in the transmission and delivery of the message here involved. But in view of the conclusion at which the court has arrived, it is unnecessary to determine whether or not the evidence in this case is sufficient to support a finding of fact to the effect that defendant was not guilty of any negligence whatever; and this conclusion is based upon the following reasons: The written message which was delivered by Dennis to defendant, to be sent to San Francisco and delivered to plaintiffs, contained the following regulation and stipulation bearing upon defendant's duties and liabilities: "It is agreed between the sender of this message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." In this case the message sent from St. Louis to plaintiffs was not a "repeated message."

The foregoing stipulation constituted a valid and binding contract between Dennis, the sender, and the defendant company. As to its validity and binding force in this state, at least, the law may be considered settled. (*Hart v. Western Union Tel. Co.*, 66 Cal. 579¹⁷; *Redington v. Pacific Postal Tel. etc. Co.*, 107 Cal. 317¹⁸; *Primrose v. Western Union Tel. Co.*, 154 U. S. 1.) These authorities declare the rule of this state upon the question. It follows, therefore, that if Dennis, the sender of the message, was bringing this action against defendant for damages suffered by him, he would be bound by the agreement made, and could only recover in case defendant was guilty of willful misconduct or gross negligence in the performance of its duty. The interesting question then presents itself: Do these plaintiffs, the addressee and receiver of the message, stand in a better position, as against defendant's negligence, than does Dennis, the sender of the message?

In England it is held by the courts with entire unanimity that the addressee of a message has no right of action against the telegraph company for failure of performance of duty. And this conclusion is based upon the proposition that the relation between the parties is purely one of contract, and the

17 56 Am. Rep. 119.

18 48 Am. St. Rep. 132.

addressee is not a party thereto. In this country it may be deemed settled law that the addressee has a right of action against the telegraph company when by its negligence he has suffered damages. At the same time the different reasons given by the different courts in adopting this rule of law are many. We will not here enter into a discussion of the general principles governing litigation arising between individuals and telegraph companies in the matter of sending and receiving messages, but will confine ourselves to a consideration of the law bearing upon the facts of this particular case.

Plaintiffs telegraphed to Dennis, in St. Louis, requesting him to send by telegram the price of two hundred and twenty tons of steel rails. In pursuance of that request Dennis telegraphed the desired information. It is thus plain that Dennis performed service for plaintiffs at their request. And that being so, we deem the conclusion irresistible that in the performance of the service Dennis was acting for plaintiffs and was their agent. The fact that plaintiffs by a telegram requested him to perform this service is immaterial. They could have made their request with the same legal result either by letter or parol. If a party residing in St. Louis had been engaged for a consideration by plaintiffs to telegraph them the information here desired, and that party had done so, certainly such party would have been the agent of plaintiffs. Yet the fact, if it be a fact, that no consideration was paid by plaintiffs for the performance of the service by Dennis is not a material element in the consideration of the question of agency. Dennis, in sending the message, being the agent of plaintiffs, they were bound by the contract made with the defendant. Plaintiffs, by requesting him to send the message, necessarily authorized him to contract with defendant as to how that message should be sent. And this general authorization was sufficiently broad to include the agreement as to nonliability heretofore set out, and, therefore, the agreement was binding upon the principal, these plaintiffs.

In discussing this identical question, Thompson on the Law of Electricity, section 237, says: "In such a case, is the receiver of the message bound by the stipulation, assuming that the sender was bound by it? If the right of action which

the receiver has against the company rests upon privity of contract and depends upon the circumstances that the sender was his agent—in other words, if the contract with the telegraph company was the contract of the receiver through his agent, the sender—then, on the most unshaken ground, the receiver would be bound by this condition, if the circumstances were such that it would bind the sender.” Now, in this state, by the authorities already cited, it is plain that Dennis was bound by the stipulation, and, having power to make it, his principal can only stand in his shoes. But it is said the action of the addressee of a message is founded upon tort, namely, a breach of public duty, and that therefore the question of contract does not enter into it. Yet, in a case like the one at bar, it may with equal legal propriety be said that a cause of action by Dennis against defendant would be founded on tort, namely, a breach of public duty, and thus eliminate any question of contract from the case. But this court has said that it cannot be done, and that Dennis must stand upon his contract as made. In cases where no question of privity of contract arises between the sender and the receiver of a message, the addressee may rest his right of action on tort; but where a party to a special contract, either directly or indirectly through the sender his agent, brings his action against the company, he must stand upon his contract rights.

We find many cases which support the conclusion at which we have arrived. The roads traveled by courts in arriving at this conclusion are many, yet those roads all lead to the same destination. In the leading case of *Ellis v. American Tel. Co.*, 95 Mass. 226, 238, no question of agency was adverted to in the opinion, yet the court said: “Besides, it is difficult to see how the plaintiff, who claims through a contract entered into by the sender of the message with the defendants, which created the duty and obligation resting in the defendants, can claim any higher or different degree of diligence than that which was stipulated for by the parties to the contract. Certainly, a derivative or incidental right cannot be greater or more extensive than that which attached to the principal or source whence such right accrued or was derived.” In *Curtin v. Western Union Tel. Co.*, 38 N. Y. Supp. 58, 16 Misc. Rep. 348, it is said: “The stipulation for exemption

from liability contained in the printed blank of the company, upon which the sender writes his message, constitutes a contract which binds him and the person to whom the message is addressed, if the assent of the sender to such stipulation can be assumed." In *Aiken v. Western Union Tel. Co.*, 5 S. C. 371, it is held: "It is equally clear that any stipulation of an express nature intended to mold and limit its obligation must be construed as attaching to the obligation in its fullest extent and affecting equally all the persons related to it, either as sender, receiver or agent of transmission. Under this view of the contract the plaintiff is entitled to enforce its performance as a direct party in interest." In *De Rutte v. New York etc. Tel. Co.*, 1 Daly, 556, 30 How. Pr. 403, we find this language: "When the defendants, therefore, undertook and were paid for sending the message, their contract was with the plaintiff, through his agent, and the action for a breach of it was properly brought by him." There is some authority opposed to the general tenor of the cases cited, as, for example, *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 303,¹⁰ and *De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383. But no question of agency appears to have been involved in those cases, and it is upon the contract made by Dennis with the defendant and the privity of contract existing between Dennis and plaintiffs that we plant our conclusion upon this branch of the case.

In view of what has been said, the remaining question presents itself, Has defendant been guilty of willful misconduct or gross negligence? No question of willful misconduct is presented by the record, and the question then is, Does the evidence support the finding of fact that defendant was not guilty of gross negligence? Gross negligence is defined to be "the want of slight diligence." "Gross negligence is an entire failure to exercise care, or the exercise of so light a degree of care as to justify the belief that there was an indifference to the things and welfare of others." "Gross negligence is that entire want of care which would raise a presumption of the conscious indifference to consequences." (See *Redington v.*

¹⁰ 78 Am. Dec. 338.

Pacific Postal Tel. etc. Co., supra.) It is conceded that the mistake in the message was occasioned by atmospheric disturbances, and that "it is impossible to overcome the action of the elements upon the wire and repeaters with any kind of care and diligence."

Plaintiff's counsel in his brief says: "In this case negligence does not consist in the manner in which the act was attempted to be done, but in the attempt to do the act at all." The mistake in the message arose in transit between Denver and Los Angeles. And in view of the fact that the message had arrived at Denver from St. Louis in due time and in proper form, there is no showing of gross negligence up to this point. Especially is this true in view of the further fact that when the message arrived at Chicago from St. Louis in transit to San Francisco, the only open line of communication to the point of its destination was via Denver and Los Angeles. It follows that counsel's claim is, that in view of the general atmospheric disturbances going on between Denver and Los Angeles defendant should have held the message at Denver until climatic changes for the better had taken place.

There can be no question but that it was the duty of defendant to forward this message from Denver at its earliest practicable moment. Our statute in terms demands it. Now, this message was received at Denver at 1:55 A. M., February 20th, and a great storm was then prevailing at intervals of distance and intervals of time between that point and Los Angeles. During the night of the 19th-20th more than two hundred messages were transmitted over the line in question from Denver; the operator at Denver knew the line had been working badly by reason of the storm, and at times it was impossible to get a message through. The line was working badly at the time the message was received at Denver, and had been so working off and on all night. But at the time the message was sent from Denver, about 5 A. M., the wire was in good working order. The two operators at Denver and Los Angeles respectively engaged in sending and receiving the aforesaid two hundred messages subsequently never heard of any complaint as to the manner of their transmission. Under the circumstances here depicted defendant was required to do

either one of two things, namely, hold the message at Denver for an unlimited time, or send it on its way. And, testing the facts in view of the meaning of the words "gross negligence" as the law defines them, this court cannot say that the finding made by the trial court to the effect that defendant was not guilty of gross negligence has no support in the evidence. The wire at the time the message was sent "was in good working order." The fact that a storm was rioting over the route should not of itself convict defendant of gross negligence in attempting to forward a message. If that be the law, then messages would not be sent for days at a time, or even weeks, during the winter season. The important question is, What is the condition of the wire? Is it in good working order? And is there a reasonable probability that the message as sent will arrive at its destination? Here the salient fact appears that the wire was in good working order when the message was sent. Taking the evidence altogether, the finding of the court that there was no gross negligence upon the part of the defendant will not be disturbed.

For the foregoing reasons the judgment and order are affirmed.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

[L. A. No. 779. Department One.—December 15, 1900.]

JOHN NICOLL, Appellant, v. JOHN WELDON et al., Respondents.

PRACTICE—SETTING ASIDE DEFAULT—DISCRETION.—The granting or denying of a motion to set aside the default of a defendant is so largely a matter of discretion with the trial court that, unless it clearly appears that there has been an abuse of this discretion, the appellate court declines to set aside the order. This discretion is the best exercised when it tends to bring about a judgment upon the merits.

ID.—MOTION GRANTED ON TERMS.—The terms imposed by the court as a condition to granting a motion of the defendant to set aside a default must, in the absence of any contrary showing, be held to be ample compensation to the plaintiff for any injury he may have suffered by the delay occasioned by the motion.

APPEAL from an order of the Superior Court of Kern County setting aside a judgment by default. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

B. Brundage, for Appellant.

Alvin Fay, for Respondents.

HARRISON, J.—After judgment had been entered against the respondents in this action upon their default, they made application to the court to have the judgment set aside and leave granted them to answer, upon the ground that their default and the judgment entered thereon was taken against them through inadvertence and excusable neglect; and in support of their motion presented affidavits setting forth the facts upon which they relied. At the hearing of the motion no counter-affidavits were filed, and the court granted their motion upon the condition that they pay into court for the use of the plaintiff the sum of twenty-five dollars. From this order the plaintiff has appealed.

The granting or denying a motion to set aside the default of a defendant is so largely a matter of discretion with the trial court that, unless it is clearly made to appear that there has been an abuse of this discretion, this court declines to set aside its order. Especially are we indisposed to review its action when it has set aside the default, and it does not appear that the plaintiff has sustained any prejudice thereby. This discretion of the court is best exercised when it tends to bring about a judgment upon the merits of the controversy between the parties. Section 473 of the Code of Civil Procedure is a remedial provision, and is to be liberally construed so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it. (*Buell v. Emerich*,

85 Cal. 116; *Harbaugh v. Honey Lake etc. Water Co.*, 109 Cal. 70; *Melde v. Reynolds*, 129 Cal. 308.) It is for this reason that we more readily listen to an appeal from an order refusing to set aside a default, than where the motion has been granted, since in such case the defendant may be deprived of a substantial right, whereas it may be assumed, if nothing to the contrary is shown, that the plaintiff will be able at any time to establish his cause of action. If, for any reason, he will be unable to do so, that fact should be made to appear; but if he is merely subjected to delay or inconvenience by having the default set aside, he can be compensated therefor by the terms which the court will impose as the condition of granting the motion.

In the present case the court was satisfied from the evidence presented to it that the neglect of the defendants was excusable, and we see no reason for questioning its conclusion in that respect. When this fact had been determined by the court, it was its duty to grant the motion upon such terms as it should deem to be just. The delay in making the application after the judgment had been rendered was a matter to be considered by that court in determining whether to grant the relief, and the terms which it imposed as a condition of granting the motion must, in the absence of any contrary showing, be held to be ample compensation to the plaintiff. It does not appear in the present case that the plaintiff will be materially, if at all, injured by the delay. He seeks by the action an injunction against the defendants for doing certain acts, and at the commencement of the action obtained a preliminary injunction against them. The judgment obtained by him and the writ of injunction issued thereon had the effect merely to make permanent the previous restraining order, and the preliminary injunction is not impaired, nor are the defendants released from its effect by setting aside the final judgment.

The order is affirmed.

Garoutte, J., and Van Dyke, J., concurred.

[Sac. No. 664. Department Two.—December 15, 1900.]

LAKE SHORE CATTLE COMPANY, Respondent, v. MODOC LAND AND LIVESTOCK COMPANY, Appellant.

SALE OF CATTLE TO SUPERINTENDENT OF CORPORATION—ACTION AGAINST CORPORATION—SUPPORT OF VERDICT—CONFLICTING EVIDENCE.—In an action against a corporation, whose business it was to purchase cattle, and which transacted all of its business in the county through its superintendent, to recover the purchase price of cattle sold, where the evidence was conflicting as to whether the purchase was made by the superintendent as actual or ostensible agent for the corporation, or for himself individually, a verdict against the corporation will not be disturbed upon appeal.

ID.—INDIVIDUAL NOTE OF SUPERINTENDENT.—The fact that the superintendent who purchased the cattle from plaintiff gave his individual note to the plaintiff for the balance of the purchase price is merely a circumstance in favor of the corporation defendant, but is not conclusive of the issue whether the corporation defendant made the purchase.

ID.—INSTRUCTION AS TO ALLOWANCE OF INTEREST—CONSTRUCTION OF VERDICT—CLERICAL ERROR—JUDGMENT.—Where the court instructed the jury that if they should find for the plaintiff they should add interest from the time the amount found became due to the date of the verdict, a verdict allowing interest on the amount found due, "at .07 per cent per annum," from a specified date until the date of the verdict, is to be construed as an intended compliance with the instructions of the court. The expression ".07" is to be regarded as clearly a clerical error; and judgment was properly entered for the amount found due, with interest at seven per cent per annum.

ID.—EVIDENCE OF SIMILAR PURCHASES BY SUPERINTENDENT.—Evidence is admissible to show that the superintendent of the corporation defendant had made similar purchases of cattle from other persons for the corporation in his own name.

ID.—PROOF OF AGENCY—DECLARATIONS—TESTIMONY OF SUPERINTENDENT.—The superintendent of the defendant corporation may testify to his agency and to purchases of cattle made by him for the corporation and reported to it; and such testimony is not subject to the objection that the agency of the superintendent cannot be proved by his declarations.

ID.—BOOKS OF SUPERINTENDENT—REPORTS OF ACCOUNTS.—The books of account between the superintendent and the corporation, in so far as included in reports made by him to the corporation, whether strictly admissible or not, are harmless, and where othe

entries not reported are of slight importance, there is no prejudicial error in their admission in evidence.

APPEAL from a judgment of the Superior Court of Modoc County and from an order denying a new trial. J. W. Harrington, Judge.

The facts are stated in the opinion of the court.

Spencer & Raker, and Clarence A. Raker, for Appellant.

Jarrett T. Richards, G. F. Harris, E. C. Bonner, and H. L. Spargur, for Respondent.

McFARLAND, J.—This action was brought to recover four thousand eight hundred dollars and interest, balance due on an alleged sale of cattle by plaintiff to defendant made November 6, 1892. The jury returned a verdict for plaintiff for the amount claimed, and judgment was rendered accordingly. Defendant appeals from the judgment and from an order denying its motion for a new trial.

The transcript presents a dreary mass of matter covering over eight hundred printed pages, and should not have occupied more than one-fourth of that amount of space. It might be somewhat justly characterized by the comparison of "two grains of wheat hid in two bushels of chaff," which Bassanio uses to illustrate the "reasons" of Gratiano. A good deal of the testimony of witnesses is given at length by question and answer. Many questions substantially the same are asked over and over again, and a very large part of the transcript is taken up with objections of counsel—the same objections being repeated many times. Under the head of "errors of law occurring at the trial," there are four hundred and ninety-nine separate specifications, covering one hundred and twenty-six pages; to the points that the evidence is insufficient to justify the verdict and that it is against law, there are many other specifications; and there are, in addition, about forty exceptions to the giving and refusing of instructions. Most, although not quite all, of these exceptions and specifications are mentioned in appellant's briefs—the briefs themselves covering over two hundred printed pages. It is, therefore, entirely impracticable to undertake to notice appellant's points in detail.

The respondent and appellant are corporations. It is averred in the complaint that the appellant, acting by and through its agent, W. H. Nelson, bought the cattle in question of respondent; and it is not disputed that one C. E. Crowder, superintendent of respondent, sold the cattle at the time mentioned in the complaint to said Nelson, who was then superintendent of the appellant. The number of cattle sold, the price, and the facts that about one-third of the purchase price was paid at the time, and that four thousand eight hundred dollars was the balance remaining unpaid, are all admitted, or proved beyond question. The real merits of the case are involved in the question whether or not the purchase was made by Nelson as agent of and for the corporation appellant. Appellant contends that Nelson made the purchase entirely for himself individually, that he was not either the actual or ostensible agent of appellant for the purpose of making such purchase, and that therefore appellant was not bound by the transaction. Respondent contends that he was appellant's actual agent, and, moreover, that whatever may have been the private understanding between him and appellant, the latter, by its acts, clothed him with ostensible authority upon which respondent had the right to rely.

As to this question the evidence was conflicting. The headquarters of appellant was in the city of San Francisco, while its main business was carried on in Modoc county, several hundred miles distant from said city. Its business is described in its charter as "the dealing in, buying and selling, management and disposition of land and livestock, and everything pertaining thereto in all respects." It was incorporated in 1886, and a few months afterward Nelson, as the minute-book of the directors shows, was elected vice-president and superintendent, and as such he was "authorized to sign checks, and make and sign contracts necessary for the proper performance of the business of the corporation." He was the only member of the corporation who lived in Modoc county; and from December, 1886, to April, 1893, during which period the sale here involved occurred, he was superintendent and attended to all the business of appellant in that county. The appellant had a large tract of land in Modoc county, and raised and bought and sold cattle there, and

the business was done entirely by and through Nelson, who was the only agent or representative of the appellant in that region of the country. These general facts were themselves strong evidence to the point that appellant had intrusted Nelson with all business in that remote country and clothed him with authority to do all acts necessary to its transaction. We will not undertake to here review the evidence. It was "conflicting" within the rule so often stated, and it cannot be said that there was no substantial evidence to sustain the verdict. The fact so much relied on by appellant, that Nelson signed his individual name to the note given for the balance of the purchase price, is merely a circumstance more or less favorable to appellant's contention; it is not by any means conclusive of the issue.

Many of appellant's objections were to evidence introduced by respondent to show that Nelson had made similar purchases of other persons; and we think that such evidence was entirely proper. There were also many objections to the testimony of Nelson upon the ground that he should not be allowed to testify as to his agency and his acts in purchasing the cattle for appellant. These objections were apparently on the theory that his declarations as to agency were not admissible; but he was present on the witness stand testifying to the matters objected to, and we see no ground for rejecting his testimony. We see no point in the objection made to the introduction of the books of the appellant. They were produced in court by appellant as appellant's books in response to a demand made for their production. We have no doubt that appellant's objections to evidence introduced by respondent were properly overruled, except, perhaps, in one instance. Nelson himself kept a book in which he, as superintendent, made entries of items of account between him and appellant, and respondent was allowed, over appellant's objections, to read certain entries from that book. The point that this was error is not very strongly urged by appellant in the briefs; still, it is made. Whether or not the entries in this book were strictly admissible under the general law as to books of account is a somewhat doubtful question; but we do not deem it necessary to definitely determine it, because most of the items of any considerable significance which were

introduced in evidence were included in reports sent by Nelson, as superintendent, to the appellant, and the others were of too little importance to be prejudicial or to warrant a reversal.

We see no error in the instructions given at the request of respondent. As to the instructions asked by appellant, the court gave the first twenty-five instructions asked, many of which are quite elaborate, and gave also three others with slight modifications. It would seem that these numerous instructions ought to include all that counsel could reasonably ask on one side of the case, and we think that they do. The instructions given presented the law of the case fairly and correctly to the jury, and sufficiently include whatever was correct in the instructions refused; and we do not think that any error was committed in the matter of giving and refusing instructions.

The court instructed the jury that if they found for plaintiff in any amount, they should add to such amount interest from the time it became due until the date of the verdict "at the rate of seven per cent per annum, simple interest"; and the verdict was for four thousand eight hundred dollars, "with interest at .07 per cent per annum from November 6, 1892," until the date of the verdict. Judgment was entered for four thousand eight hundred dollars, with interest at seven per cent per annum, and counsel for appellant strenuously contend that this was error because ".07 per cent" does not mean "seven per cent." It is sufficient to say that the expression ".07" was clearly a clerical error, and must be construed as an intended compliance with the instructions of the court.

We have noticed the prominent facts of the case, and we deem it enough to say in conclusion that the record presents no ground for reversal of the judgment or of the order denying a new trial.

The judgment and order appealed from are affirmed.

Temple, J., and Beatty, C. J., concurred.

Hearing in Bank denied.

[Sac. No. 673. Department Two.—December 17, 1900.]

JOHN MURPHY, Appellant, v. JOHN MADDEN, Treasurer of Modoc County (MICHAJAH PINKNEY, Substituted), Respondent.

PAYMENT OF WITNESS IN CRIMINAL CASE—VOID ORDER FOR WARRANT—NUNC PRO TUNC ORDER BY SUCCEEDING JUDGE.—An order of a superior judge not made by the court nor entered in the minutes of the court, directing the county auditor to draw his warrant for a specified sum "in favor of the above-named witness," no name being inserted in the order, is void and ineffectual for any purpose. It cannot authorize the auditor to draw his warrant, nor constitute the basis of an order *nunc pro tunc* made by a succeeding judge and entered upon the minutes of the court in favor of a witness named who had attended in a criminal case.

ID.—MANDAMUS TO TREASURER.—*Mandamus* will not lie to the county treasurer to compel payment of a warrant drawn by the auditor under such void order.

ID.—CONSTRUCTION OF PENAL CODE—EXPENSES OF POOR WITNESSES. Section 1329 of the Penal Code does not provide a mode in which witnesses in criminal cases generally are to be paid; but relates only to the special case of the expenses of poor witnesses attending from outside the county, and simply furnishes the court with the means of procuring their attendance.

ID.—FEES IN CRIMINAL CASES—ACT OF 1895—MODE OF PAYMENT—PRESENTATION TO SUPERVISORS.—The fee bill of 1895, supposing it to have any application to a witness for whom an order is made under section 329 of the Penal Code, does not provide a mode for enforcing the fees of witnesses attending in criminal cases; and if they constitute a valid charge against the county, which is not determined, they are to be submitted to the board of supervisors as other claims against the county are submitted.

APPEAL from a judgment of the Superior Court of Modoc County denying a writ of mandate. J. W. Harrington, Judge issuing alternative writ. N. D. Arnot, Judge presiding upon denial of writ.

The facts are stated in the opinion of the court.

G. F. Harris, for Appellant.

John E. Raker, and E. C. Bonner, District Attorney, for Respondent.

TEMPLE, J.—This appeal is from a judgment in the superior court denying a writ of mandate to the county treasurer. The judgment was upon demurrer, the plaintiff declining to amend.

The petition shows that petitioner attended as a witness in the trial of a criminal case, in obedience to a subpoena, for seven days, and to attend traveled one mile. Judge Claflin, who presided at the trial, made an order in writing, but which was not entered in the minutes of the court, as follows, after the title of the cause:

“The auditor of Modoc county, California, is directed to draw his warrant upon the treasurer of said county in favor of the above-named witness, payable out of the general fund of the county, for ten dollars and sixty cents.

“Witness my hand this 19th day of December, 1896.

“C. L. CLAFLIN,

“Judge of Superior Court.”

Thereafter, March 8, 1897, upon a showing, the superior court made what is called “an order *nunc pro tunc*.” That was after the term of Judge Claflin had expired, and Hon. J. W. Harrington was superior judge. In this order, *inter alia*, it is recited that it appeared that the plaintiff, in obedience to a subpoena, actually attended as a witness in the trial of a criminal case, and that the amount allowed was necessary for the expenses of the witness, and is not in excess of one dollar and fifty cents per day and ten cents per mile for travel, and the auditor was ordered to draw his warrant for the amount. The former order made by Judge Claflin is then described as being for the same amount, and the order then proceeds as follows: “It is ordered that this order be entered as of the same date, to wit, nineteenth day of December, A. D. 1896, and be and operate as fully in particular as if said order had been made and entered by the Hon. Claflin on said date in the minutes of the court.”

Prior to this so-called *nunc pro tunc* order, to wit, December 19, 1896, the auditor had issued a warrant to petitioner for the amount. On the eighth day of March, 1897, after the *nunc pro tunc* order had been made, this warrant was pre-

sented to the treasurer, who refused to pay the same, and thereupon this proceeding was inaugurated.

The order made by Judge Claflin is ineffectual from any point of view. It is in favor of no one and does not authorize the auditor to draw his warrant for any person. The recital is "in favor of the above-named witness," but no person is named. It could have no validity under section 1329 of the Penal Code for the further reason that it was not made by the court and entered in the minutes of the court. Counsel contends that it is, or may be, an *ex parte* order, and as such might have been made in chambers. But conceding it to be an *ex parte* order, still this would not follow, for it is expressly provided in section 1329 of the Penal Code, as to this order, that it must be, "if the attendance of the witness be upon a trial," by the court and by order entered upon its minutes; in other cases, by the judge by written order. The statute itself discriminates between the "court" and the "judge," and provides that in one case the court must act, and in the other the judge may. Whatever is done by the court is also done by the judge as an essential constituent of the court, but the converse is not true.

The order made by Judge Harrington was evidently intended to be a compliance with the act to establish fees, passed in 1895 (Stats. 1895, p. 267), and counsel on both sides seem to so consider it. Supposing that act to apply, a proposition which is seriously contested, it simply determines fees which certain persons, officers, witnesses, and others are entitled to charge, but declares nothing as to who shall pay, or in what mode payment can be enforced. Counsel for appellant contends that section 1329 of the Penal Code provides the mode in which witnesses in criminal cases are to be paid. I am unable to agree with counsel in this contention. Section 1329 provides only for the special cases of witnesses from without the county, and those too poor to pay the expense of attendance. As to neither class does it provide compensation or anything in the nature of fees, and, as to the poor, it simply furnishes the court with the means of procuring the attendance of the witnesses.

There being no mode provided for the payment of these fees, supposing they constitute a valid charge against the

county—which we do not determine—they are to be submitted to the board of supervisors as other claims against the county are submitted.

We have not found it necessary to determine whether the successor of Judge Claflin could pass upon the claim of the witness, under the fee bill of 1895. If the court had made a valid order which, for some reason, was not entered in the minutes, no doubt this order so made, or another to the same precise effect, could have been subsequently entered as of the date the first order was made, but as the court, in December, 1896, failed to make an order in the matter, the so-called *nunc pro tunc* order made by Judge Harrington must be sustained, if at all, as an order made in the first instance. Nor do we find it necessary to decide whether Modoc county has a special fee bill.

The judgment is affirmed.

McFarland, J., concurred.

BEATTY, C. J. concurring.—I concur. I wish to add to what is said by Justice Temple that, although there is no law which authorizes a court or judge to make an order for the payment of any claim of a witness, except in the cases specified in section 1329 of the Penal Code, I still think that all fees claimed under the act of 1895 (Stats. 1895, p. 273) must be audited by the court before any claim therefor can be allowed and ordered paid by the board of supervisors.

[Crim. No. 666. Department One.—December 18, 1900.]

THE PEOPLE, Respondent, v. GEORGE WARREN, Appellant.

CRIMINAL LAW—GRAND LARCENY—INDICTMENT—DESCRIPTION OF STOLEN PROPERTY—CERTAINTY.—In an indictment for grand larceny, the description of the property stolen as "four calves, then and there the personal property of Anton Luchessa," is sufficiently certain.

ID.—CONTINUANCE—INTOXICATION OF COUNSEL—CONTEMPT OF COURT—PREPARATION OF OTHER COUNSEL—DISCRETION.—The counsel for the defendant cannot, by becoming intoxicated, and incurring a penalty for contempt, after impanelment of the jury, give to the defendant the right to an indefinite continuance of the case. It is in the discretion of the court to allow newly appointed associate counsel a reasonable time for preparation and to refuse a continuance; and where its action was not arbitrary, its discretion will not be interfered with upon appeal.

ID.—TRIAL—CALL OF JURY FOR TESTIMONY—VERDICT BEFORE TIME FIXED FOR READING—DISCRETION OF COURT.—Upon the request of the jury, while considering the cause, made to the court at 11 o'clock P. M., for the reading of the testimony of a witness for the defendant, which it would require two hours to read, the court did not abuse its discretion by fixing 9 o'clock of the next morning as the time for such reading, and adjourning court until that time; and where the jury, a few moments before the time fixed for the reading, announced their verdict of guilty, and adhered thereto after being polled, the court had discretion to receive their verdict, without the reading of the testimony called for.

ID.—AIDING AND ABETTING CRIME—INSTRUCTIONS—CASE OF ERROR.—It is error to instruct the jury that one who aids or abets in the commission of a crime may be punished as a principal; but such error is cured by clear and explicit instructions that "all persons who aid and abet in the commission of a crime are principals," and that "in every crime there must exist a union or joint operation of act and intent, or criminal negligence." Under such instructions the jury could not be misled to believe that one who innocently aids in the commission of a crime may be found guilty.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from an order denying a new trial.
E. P. Unangst, Judge.

The description of the property stolen was as stated in the first syllabus. Further facts are stated in the opinion.

Graves & Graves, Louis Lamy, and Charles A. Palmer, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

COOPER, C.—Defendant was jointly indicted with one J. A. Warren, Jr., for grand larceny, and convicted. This appeal is from the judgment and an order denying a new trial. It is conceded that the evidence is sufficient to sustain the verdict.

Defendant contends that the indictment did not describe the property alleged to have been stolen with sufficient certainty. The description has been held sufficient in *People v. Warren, post*, p. 683, and upon the authority of that case the point is settled. Error is assigned in the refusal of the court to continue the case, during the trial, for the purpose of allowing defendant to employ other counsel. The facts, as shown in the record, are as follows: The trial commenced on Monday, April 2, 1900, and a jury was impaneled. At 1:30 P. M. of April 3d, at the opening of the afternoon session, Ernest Graves, who had up to that time been defendant's sole attorney, came into court in an intoxicated condition, and, after some time taken up in an attempt to proceed with the trial, it became apparent to the judge presiding that the defendant's attorney was so much under the influence of liquor that the business of the court could not proceed in regular order. The court thereupon admonished counsel, stating that counsel was evidently not in a condition to proceed with the trial, and, while the court was so speaking, counsel interrupted in an insolent and impudent manner, saying: "The allegations of the court are false." Thereupon the court fined the attorney fifty dollars for contempt of court, but suspended the execution of the fine until the conclusion of the trial, expressly stating that it was not the intention of the court to stop the proceedings of the trial. The court thereupon admonished the jury and adjourned until 3 o'clock P. M. of the same day. Just as the judge rose to leave the bench, the attorney, in a loud, violent, and of-

fensive manner, applied to the judge an insulting epithet. The court then ordered the attorney into custody of the sheriff and made an order for him to show cause on the following day, April 4th, at 9 o'clock A. M., why he should not be punished for contempt. The case was then continued until April 4th, at 9 o'clock A. M., at which time the court imposed a further fine upon the attorney, and made an order committing him to jail for five days. The court thereupon sent for William Graves, the partner of Ernest Graves, who had been sent to jail, and appointed said William Graves as counsel for defendant. The said William Graves requested time to investigate the facts of the case, and the court thereupon continued the case until 1:30 P. M., and directed the reporter to read to said William Graves, if desired, all the proceedings in the case. Upon the calling of court at 1:30 P. M. William Graves made a motion for a continuance, upon his own affidavit and the affidavit of defendant, in which it was stated that William Graves was not familiar with the facts of the case, and could not safely proceed, and that he was pressed with other professional engagements. The court, after the motion for a continuance was argued and considered, remarked: "I would wish very much to be able to give the defendant an adjournment for some time if it were not for the fact that the jury has been impaneled and that there are a large number of witnesses here in attendance, and we are in the midst of the trial. Mr. Graves has pleaded other engagements—Mr. William Graves. I will not set aside the order I made yesterday. I will still let you stand as attorney of record, and I will appoint Mr. Palmer—Charles Palmer—as additional counsel for defendant. I will let this case stand over until to-morrow at half-past one P. M., at which time the defendant will be prepared to proceed. Mr. Reporter, you will read for the counsel any of the testimony that has been taken in the proceeding, that they may be fully advised of the proceedings to date, whenever they desire it, between now and 1:30 P. M. to-morrow." April 5th, at 1:30 P. M., Louis Lamy, an attorney at law, appeared at the request of William Graves, and with said Palmer acted as attorney for defendant. The said attorneys, Lamy and Palmer, renewed the motion for a continuance, which the court de-

nied and ordered the trial to proceed. The trial then proceeded, witnesses were examined, and on April 9th, after serving out his five days, Ernest Graves appeared in court and assisted the said Lamy and Palmer in the defense. The trial was completed on April 11th, and the case argued to the jury, and Ernest Graves took part in the argument.

We do not think the court erred in refusing to further continue the case. Motions of this kind rest much in the discretion of the court below, and it is only in cases of arbitrary action or abuse of discretion that we would be justified in interfering with the order of the court. In this case the court did not act arbitrarily, but proceeded with care and a constant regard for the rights of defendant. Several adjournments were granted to give counsel time to prepare for trial and to become familiar with the case. While the rights of a defendant should always be carefully guarded, so that his defense may be fully presented, at the same time the public interest and business must be conducted in an orderly manner. Here a jury had been impaneled and the trial had progressed to the afternoon of the second day. Witnesses were in attendance and the case taking its regular course. The counsel could not, by becoming intoxicated or incurring the penalty of contempt, give the defendant the right to an indefinite postponement of the case. All the defendant could require, as a matter of right, would be a reasonable time to have other counsel become familiar with the facts of the case. This time was granted by the court, and, under the circumstances, appears to have been amply sufficient. The court must have discretion in such cases. (*People v. Goldenson*, 76 Cal. 341.)

It is claimed that the court erred in not ordering the testimony of J. A. Warren, Sr., read to the jury. The case had been submitted to the jury about three hours, when they came into court after 11 o'clock P. M. and asked to have the testimony of said Warren read. The judge then asked the reporter how long it would take to read the testimony, and was informed that it would take about two hours, as there was about three hundred pages of it. The judge then announced to the jury in the presence of counsel that owing to the lateness of the hour it would be necessary to adjourn un-

til the next day at 9 o'clock A. M., when the testimony would be read. No objection or exception was then made, and the jury retired and court adjourned. A few minutes before 9 o'clock the next morning the jury came into court and announced that they had agreed upon a verdict. Counsel then objected to the verdict being received because the testimony called for by the jury had not been read. The judge remarked that the jury had found a verdict without having such testimony read, and that he knew of no course except to receive it, and that the jury might be polled, and if any juror desired to express himself he might do so. The jury were polled and all answered that it was their verdict. The court did not deny the right of defendant to have the testimony read. Neither was it an abuse of discretion to adjourn court till the following day for such purpose. The court would not be required to remain in session all night for the purpose of having testimony read to the jury. The court erred in giving to the jury the instruction to the effect that all persons who aid or abet in the commission of a crime, though not present, shall be prosecuted and punished as principals (*People v. Warren, post*, p. 683); but the error was cured, as in that case, by a direct and clear statement of the law in other parts of the charge. The jury were elsewhere told that all persons who "aid and abet in the commission of a crime are principals," and "in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence." In such case we cannot believe that the jury understood that a person who innocently aids in the commission of an offense may be found guilty. The jury, if possessed of common sense, could not have given the word "aid" its extremely narrow and literal sense.

The judgment and order should be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Van Dyke, J., Garoutte, J., Harrison, J.

[Crim. No. 667 Department One.—December 18, 1900.]

THE PEOPLE, Respondent, v. J. A. WARREN, Jr., Appellant.

CRIMINAL LAW—GRAND LARCENY—INDICTMENT—DESCRIPTION OF STOLEN PROPERTY—CERTAINTY.—In an indictment for grand larceny, the description of the property stolen as "four calves, then and there the property of Anton Luchessa," is sufficient.

ID.—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—BRANDING OF CALVES—ABSENCE OF DEFENDANT—PRESUMPTION UPON APPEAL.—Where the evidence adduced at the trial is not set forth in the record upon appeal, and an affidavit on motion for a new trial for newly discovered evidence sets forth the presence of the affiant at the marking and branding of calves by the father and brothers of defendant about a week before the date of the alleged larceny, and that the defendant was not then present, it cannot be presumed upon appeal, in favor of the materiality of the evidence, that the larceny was shown to have been committed at the time of such marking and branding.

ID.—INSUFFICIENT SHOWING FOR NEW TRIAL.—A motion for a new trial upon the ground of newly discovered evidence is looked upon with disfavor; and where it appears, in view of the affidavit and counter-affidavits, that there is not a sufficient showing of diligence or of the truth and materiality of the evidence to make a strong case in favor of the motion, it is properly denied.

ID.—POSSESSION OF STOLEN PROPERTY—MODIFICATION OF REQUESTED INSTRUCTION—POSSESSION BY CONSENT AND WILL OF ACCUSED.—An instruction requested by the defendant, upon the subject of the possession of stolen property as a circumstance tending to prove guilt, that "the possession must be personal and exclusive, and must be such as to preclude the inference that the stolen property was in the possession of any other person than the defendant," is properly modified by striking out all after the word "exclusive," and inserting in lieu thereof, "or it must be the possession of some person or persons by the consent and will of the accused, and in either case the possession must involve a distinct and conscious assertion of possession by the accused."

ID.—AIDING AND ABETTING CRIME—CURE OF ERRONEOUS INSTRUCTIONS.—An erroneous instruction to the effect that persons who have "aided or abetted" in the commission of a crime may be punished as principals is cured by correct instructions upon the subject of aiding and abetting in its commission and as to the burden of proof thereof, where the jury could not, in view of the instructions as a whole, have been misled into the belief that the defendant could be found guilty for an innocent aiding in the commission of the offense.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from an order denying a new trial. E. P. Unangst, Judge.

The facts are stated in the opinion.

Graves & Graves for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

COOPER, C.—The defendant was convicted of the crime of grand larceny, and has appealed from the judgment and from an order denying his motion for a new trial.

It is conceded that the evidence was sufficient to justify the verdict, but certain errors are urged which we will notice in the order presented in defendant's brief. It is claimed that the indictment does not state facts sufficient to constitute a public offense, for the reason that the personal property alleged to have been stolen is not described with sufficient certainty. The description is "four calves, then and there the personal property of Anton Luchessa." This description is sufficiently certain. (*People v. Littlefield*, 5 Cal. 355; *People v. Stanford*, 64 Cal. 27; *State v. Stelly*, 48 La. Ann. 1480; *State v. Friend*, 47 Minn. 449.) Defendant made a motion for a new trial upon the ground of newly discovered evidence. In support of the motion he filed the affidavit of one Music, in which it was stated by Music that he was at the ranch of J. A. Warren, Sr., the father of defendant, two or three days before the seventeenth day of November, 1899, and that the father and two of his sons were marking and branding calves in the corral, and so marked and branded eight or ten calves; **that defendant was not there** and Music did not see him that day. The larceny is charged to have occurred on the twenty-second day of November, 1899. We do not see how the fact that Music did not see defendant at the corral two or three days before the 17th of November, 1899, could have affected the result. It is said the evidence of Music would have tended to prove an alibi. The evidence introduced at the trial is not in the record, and we cannot presume that the larceny was shown to have been committed at the time of marking

the calves spoken of by Music. The affidavit of Music shows that George Warren was present in the corral at the time of the marking spoken of by Music, as well as his brother William and his father J. A. Warren, Sr. It is not shown why the evidence, if material, was not produced at the trial, as the affidavit shows that at least four parties were present at the marking. It was further shown by counter-affidavits that Music was a witness at the trial, and in substance testified to the same facts set forth in his affidavit on motion for a new trial. A motion for a new trial upon the ground of newly discovered evidence is looked upon with suspicion and disfavor, and a party who relies upon such ground must make a strong case both in respect to diligence on his part and as to the truth and materiality of the evidence, and if he fails in either respect his motion must be denied. (*People v. Freeman*, 92 Cal. 359; *People v. Rushing*, ante, p. 449.) The showing made in this case was not sufficient either as to diligence or as to the truth and materiality of the evidence.

The defendant offered the following instruction: "The possession of stolen property in a case of larceny is a circumstance tending to prove guilt only where it appears that the defendant acquired the possession by his own act or with his concurrence or knowledge. The possession must be personal and exclusive, and must be such as to preclude the inference that the stolen property was in the possession of any other person than the defendant."

The court modified the instruction by leaving out the words "and must be such as to preclude the inference that the stolen property was in the possession of any other person than the defendant," and in lieu thereof added: "Or it must be the possession of some person or persons by the consent and will of the accused, and in either case the possession must involve a distinct and conscious assertion of possession by the accused."

The modification was proper. It clearly appears therefrom that if the property had been found in the possession of a third party without the knowledge of defendant, and with no assertion of possession on his part, such circumstance would not tend to prove his guilt. The jury were clearly told that the possession of a third party must involve a distinct and conscious assertion of possession by the defendant. Of course,

the possession of a third party by the consent and will of defendant and for his benefit would be his possession. The court instructed the jury: "The court further instructs the jury that the distinction between an accessory before the fact and a principal in case of a felony is abrogated, and all persons concerned in the commission of a felony, whether they directly committed the act constituting the offense, or aided or abetted in its commission, though not present, shall be prosecuted, tried, and punished as principals."

This instruction was erroneous as held by this court in *People v. Dole*, 122 Cal. 492.¹ In that case, however, it was held that where other instructions were given, by which it clearly appeared "that merely aiding or assisting in the commission of a crime without guilty knowledge is not criminal," the instructions were to be read together and the error was cured. In this case the erroneous instruction was followed by the correct instruction: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed."

And the court further instructed the jury that the burden was upon the prosecution to prove "that the calves were stolen by the defendant and by no other person; or that they were stolen by the defendant and another person or persons who had conspired together to commit the crime; or that they were stolen by some other person or persons, while the defendant aided and abetted such other person or persons in stealing them."

The jury could not, in view of these instructions as a whole, have believed that defendant could be found guilty for merely aiding innocently and without guilty knowledge or intent in the commission of the offense charged.

We advise that the judgment and order be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Van Dyke, J., Garoutte, J., Harrison, J.

¹ 68 Am. St. Rep. 50.

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ABATEMENT. See *Estates of Deceased Persons*, [4](#)

ACCIDENT INSURANCE. See *Insurance*.

ACKNOWLEDGMENT. See *Mortgage*, [21-23](#), [31](#), [32](#).

ADVERSE POSSESSION.

- 1. BOUNDARY BETWEEN ADJACENT LOTS—ADVERSE POSSESSION OF STRIP—FENCE—PRESCRIPTIVE TITLE.**—In an action involving the ownership of a strip of land, depending upon a question of boundary between adjacent city lots, evidence showing that the defendant in 1863, immediately upon purchase of one of the lots, entered upon and took possession of the strip in controversy by the erection of a division fence which included it, under the belief that the strip was part of the purchased lot, and maintained such fence continuously thereafter, and that the plaintiff never had possession of the strip, though claiming it by conveyance of the adjoining lot, is sufficient to support findings and judgment for the defendant, based upon adverse possession and a prescriptive title to the strip. (*Lucas v. Provines*, [270.](#))
- 2. PAYMENT OF TAXES NOT INVOLVED.**—Where a prescriptive title by adverse possession was complete prior to 1878, the amendment of that year to section [325](#) of the Code of Civil Procedure making payment of taxes an element of adverse possession has no application. (*Id.*)

See *Deed*, [2](#).

AGENCY.

OSTENSIBLE AUTHORITY TO DRAW ON PRINCIPAL—EVIDENCE.—Upon a review of the evidence as to the prior course of dealings between the parties, the defendants are held to have made the drawer of the drafts sued on their ostensible agent in drawing, presenting, and cashing such drafts, and that the plaintiff was not guilty of ordinary negligence, within the meaning of section 2334 of the Civil Code, in cashing them. (*Bank of Ukiah v. Mohr*, [268.](#))

See *Attorneys at Law*; *Banks*, [10](#); *Brokers*; *Conversion*, [3](#); *Corporation*, [12-16](#); *Deed*, [12](#); *Gambling Contract*, [1](#), [2](#), [6](#); *Jurisdiction*; *Mortgage*, [27](#); *Statute of Frauds*, [2](#); *Telegraph Companies*, [3](#).

ALIMONY. See Divorce, 1, 3.

AMENDMENT TO CONSTITUTION. See Constitutional Law.

APPEAL.

1. **REVERSAL OF JUDGMENT—DIRECTION FOR COSTS—REMITTITUR—LACHES.**—Where a judgment of the superior court is reversed on appeal, without the insertion in the order of any direction as to costs, it is the duty of the clerk of the supreme court under rule XXIII of that court, to enter upon the record a judgment that appellant recover his costs of appeal, and to insert such direction in the *remittitur*. If the clerk enters the judgment correctly but omits to insert such direction in the *remittitur*, the appellant is entitled to have the *remittitur* recalled, and a proper one issued, and it is not laches to delay the application therefor to the next term of the supreme court in the district in which the appeal was heard. (*Baker v. Southern California Ry. Co.*, 113.)
2. **ATTEMPT TO COLLECT COSTS.**—The fact that the appellant made two unsuccessful attempts to collect his costs under two imperfect *remittiturs* issued by the clerk is no objection to the application. (*Id.*)
3. **APPLICATION TO RECALL REMITTITUR—GROUND OF MOTION.**—An objection to the application on the ground that the notice of the motion did not specifically state that it would be made on the ground that the *remittitur* failed to conform to the judgment will not be sustained, where the terms of the notice otherwise disclose that this was the ground of the motion, and the opposite side was not prejudiced by the omission. (*Id.*)
4. **DISMISSAL—SATISFACTION OF JUDGMENT—MOOT CASE.**—An appeal will be dismissed where it appears that the judgment appealed from has been satisfied, and that the questions presented have become merely a moot case. (*Moore v. Morrison*, 80.)
5. **LIMITATION OF TIME—JURISDICTION—MANDATORY STATUTE—SUBSEQUENT DISABILITY.**—Statutes limiting the time for appeal are jurisdictional and mandatory, and the courts have no power not given by the statute to extend the time limited for an appeal. When the period of limitation has begun to run, no subsequent disability will suspend its operation. (*Williams v. Long*, 58.)
6. **DISMISSAL OF APPEAL FROM JUDGMENT—DEATH OF RESPONDENT—SERVICE OF NOTICE.**—An appeal from the judgment will be dismissed if taken after the lapse of the time limited therefor; and the fact that the respondent died some eighteen days before the expiration of the six months allowed for the appeal, and that not until after its expiration an administratrix was appointed upon whom service of notice of the appeal was made with due diligence, cannot operate to suspend the period of limitation, or to preclude the dismissal of the appeal. (*Id.*)

APPEAL (Continued).

7. **ARGUMENT UPON APPEAL—ASSIGNMENTS OF ERROR NOT ARGUED.**—Numerous assignments of error appearing in the transcript on appeal, which are mere naked statements that the court erred in making certain rulings, without any argument made of reasons given why such rulings are erroneous, will not be inquired into by this court upon appeal in order to find out reasons for or against the correctness of the rulings, if they are not apparently objectionable upon their face. (*People v. Breen*, 72.)
8. **APPEAL FROM JUDGMENT—REVIEW OF EVIDENCE—SUPPORT OF FINDINGS.**—Upon appeal from a judgment, taken more than sixty days after the entry thereof, the evidence cannot be reviewed to ascertain whether it supports the findings. (*Ryland v. Henry*, 426.)
9. **DEATH OF RESPONDENT AFTER SUBMISSION—JUDGMENT NUNC PRO TUNC.**—Where a respondent dies after the submission of the cause, an affirmance of the judgment will be entered *nunc pro tunc* as of a date prior to the death. (*Lucas v. Provines*, 270.)
10. **ORDER GRANTING NEW TRIAL—AFFIRMANCE—LAW OF THE CASE—DUTY OF LOWER COURT.**—The decision of this court upon questions of law in affirming upon appeal an order granting a new trial, is the law of the case; and it is the duty of the lower court not to depart from the decision of this court upon the new trial. (*Kent v. San Francisco Sav. Union*, 400.)
11. **ABSENCE OF UNDERTAKING—DISMISSAL—JOINT NOTICE BY CITY AND WATER COMPANY.**—Where a city and a water company jointly gave notice of their appeals, the situation is no different from what it would have been if either had prosecuted its several appeal and served the other with notice thereof, and a motion to dismiss both appeals for want of an undertaking on appeal will be denied as to the city, which is not required to give an undertaking, and will be granted as to the water company, the appeal of which is ineffectual in the absence of an undertaking. (*Meyer v. City of San Diego*, 60.)
12. **STIPULATION FOR DISMISSAL—ABSENCE OF TRANSCRIPT—CLERK'S CERTIFICATE.**—In the absence of the transcript upon appeal disclosing who are the attorneys of record, an appeal will not be dismissed upon a mere stipulation of attorneys, without a certificate of the clerk, under seal of the court, setting forth the matters required by rule VI of this court, and also the date of the entry of the order or judgment appealed from. (*Camenzind v. Kampfen*, 596.)
13. **JUDGMENT IN FORECLOSURE—STAY BOND UPON APPEAL—INSUFFICIENCY OF SURETIES—SETTING ASIDE VOID SALE.**—A stay bond upon appeal from a judgment foreclosing a mortgage is operative, notwithstanding the pecuniary insufficiency of the sureties, until the failure of the sureties to justify after exception taken; and

APPEAL (Continued).

a sale made after the giving of such stay bond, and prior to exception taken to the sureties, is void, and should be set aside upon motion. (Wheeler v. Karnes, 618.)

14. **STATUTORY REGULATION OF STAY BOND—EQUITABLE CONSIDERATIONS NOT PERMISSIBLE.**—The matter of a stay bond on appeal is one of statutory regulation; and the statute governs irrespective of equitable considerations. The legislature has failed to provide for the contingency of injustice to a judgment creditor by the mere filing of a stay bond with sureties not having sufficient pecuniary liability. (Id.)
15. **REPETITION OF SURETIES FOR DIFFERENT SUMS.**—A stay bond which is sufficient in form and amount is not vitiated by the fact that some of the sureties are on it twice for different sums. (Id.)
16. **ORDER FIXING STAY BOND IN FORECLOSURE—WASTE, OCCUPATION, AND DEFICIENCY—GENERAL AMOUNT—SPECIFICATIONS IN BOND.** The order fixing the amount of a stay bond upon appeal from a judgment foreclosing a mortgage need not specify separate amounts for waste, occupation, and deficiency, but may merely name the whole amount deemed necessary to meet the requirements of section 495 of the Code of Civil Procedure, although the undertaking must contain covenants for each of those matters covered by that section. (Id.)

See Compromise, 6; Damages, 3; Divorce, 4; Estates of Deceased Persons, 1; Findings, 2; Judgment; Jury and Jurors, 1, 3; Mandamus, 3; Mortgage, 18; New Trial, 3, 5; Partition, 3; Place of Trial, 2.

ARREST.

1. **USE OF UNNECESSARY FORCE—LIABILITY OF OFFICER AND SURETIES.** An officer who, in making a lawful arrest, uses excessive and unnecessary force, is liable upon his official bond for damages thereby caused to the person arrested. (Towle v. Mathews, 574.)
2. **CONSTRUCTION OF FINDING—"WILLFUL" SHOOTING BY DEPUTY—"MALICE" NOT IMPORTED—"INTENTIONAL" ACT.**—A finding that a deputy officer, in making the arrest, "willfully shot plaintiff in the back," is not to be construed as importing that the deputy acted "maliciously," and that his action was therefore extra-official, for which the officer was not liable, but is to be construed as employing the term used in its ordinary sense, and importing that the deputy "intentionally" or "willingly" shot the plaintiff. (Id.)

See Debtor and Creditor.

ARSON. See Criminal Law, 3, 10, 11.

ASSIGNMENT. See Banks, 6; Contract, 3; Estates of Deceased Persons, 1-3; Street Assessment, 2.

ATTACHMENT. See Mortgage, 31, 32.

ATTORNEYS AT LAW.

1. **JUDGMENT OF DISBARMENT—AFFIRMANCE ON APPEAL—MODIFICATION.**—A judgment of the superior court, disbarring an attorney, which has been affirmed by the supreme court, cannot be modified by the latter court after the issuance of the *remittitur*. An application for a modification should be made to the superior court. (Disbarment of Wharton, 486.)
2. **ESTATE OF DECEASED PERSONS—EXECUTOR'S ACCOUNT—ALLOWANCE TO ATTORNEY—NEGLIGENCE IN SUIT—GENERAL EMPLOYMENT—FINDING—APPEAL.**—Upon the settlement of an executor's account including an allowance to an attorney, where it was claimed by the executrix who was a legatee, that the attorney was negligent in the prosecution of a suit to which the executors were parties and the court found that the general employment of the attorney included the conduct of such suit, the executor and attorney, as respondents to her appeal, cannot question such finding; and the fact that the attorney regarded the suit as a distinct employment, and did not ask for compensation therefor, could not prevent the question of such alleged negligence from being considered in fixing his compensation as attorney for the executors, under such finding. (Estate of Kruger, 621.)
3. **NEGLIGENCE UPON MOTION FOR NEW TRIAL.**—An attorney is negligent in the conduct of a cause, upon motion for a new trial, in failing to present the proposed statement and amendments to the judge for settlement within the period provided by law, and in failing to have any facts showing a valid excuse for the delay incorporated into the statement. It does not excuse such negligence that a valid excuse in fact existed, which was not so incorporated and certified in the statement. (Id.)
4. **ARGUMENT UPON APPEAL—EVIDENCE OF NEGLIGENCE.**—An argument upon appeal from the evidence of the negligence of the attorney for the executors in not incorporating an excuse in his statement on motion for a new trial in another cause need not be shown to have been first made in the court below. (Id.)
5. **LIABILITY OF ATTORNEY FOR NEGLIGENCE.**—An attorney is liable for a want of such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise. (Id.)
6. **CONSENT TO COMPROMISE BY CODEFENDANTS—STIPULATION SIGNED BY ATTORNEY—SUPPORT OF FINDING.**—Evidence that the codefendants in the previous suit not made parties to the present action for a specific performance of the compromise verbally consented and agreed thereto and that the stipulation for the compromise was signed by their attorney by their authority and consent, is sufficient to support a finding in favor of the authority of the attorney to enter into the stipulation. (Wall v. Mines, 27.)

ATTORNEYS AT LAW (Continued).**7. AUTHORITY OF ATTORNEY TO STIPULATE—CONSTRUCTION OF CODE.—**

Section 283 of the Code of Civil Procedure was not intended either to enlarge or to abridge the authority given to an attorney by the client, but only to prescribe the manner of its exercise; and an authorized stipulation may be enforced, even if not complying with the terms of that section, if it is not forbidden by any other statute or principle of law. (Id.)

See Banks, 9; Contempt, 2; Practice, 1, 2.

BAILMENT. See Pleading, 3-8; Pledge; Warehouseman.

BANKS.**1. INSOLVENT BANK—PREFERENCE OF DEPOSITORS NOT STOCKHOLDERS**

—LOAN TO BANK BY STOCKHOLDER.—In an insolvent bank incorporated under the act of April 11, 1862, the claims of depositors not stockholders are preferred over those of depositing stockholders, in the absence of a by-law entitling them to share equally with them. But if the stockholder is not a depositor, and has loaned the money to the bank, he is entitled to share equally in the assets with other creditors. (Murphy v. Pacific Bank, 542.)

- 2. CONSTRUCTION OF ACT OF 1862—"DEPOSITORS"—ORDINARY CERTIFICATES OF DEPOSIT—LOAN NOT REPRESENTED.—**In the act of 1862, the term "depositors" is intended to include not only those who have made deposits in the bank subject to check, but also the holders of ordinary certificates of deposit, not subject to check, which are in the nature of a receipt for a deposit executed by the bank, reciting that a sum specified has been deposited in the bank by the depositor payable to himself or order, upon return of the certificate properly indorsed. Such certificates, though negotiable and payable immediately, are not notes, and do not represent a loan, nor bear interest not stipulated, but represent the money deposited in the bank to be retained until demanded. (Id.)

- 3. CONSTITUTIONALITY OF ACT OF 1862—CLASSIFICATION OF DEPOSITORS.—**The act of 1862 is constitutional and valid, and is not subject to the objection that it improperly classifies the depositors in a bank, and subjects individuals of the class who are stockholders to special burdens, from which other depositors are exempt. The stockholders constitute the corporation, and are entitled to share in the profits derived from deposits made by those not stockholders, who are merely creditors of the bank; and depositors who are stockholders are not in the same class with depositors who are not stockholders. (Id.)

- 4. FINDING OF INSUFFICIENT ASSETS—JUDGMENT UPON STOCKHOLDER'S CERTIFICATE—PROVISION FOR STAY.—**In an action against the bank by the assignee of a certificate of deposit issued to a stockholder, where the court found that the bank was insolvent, and

BANKS (Continued).

that its assets were insufficient to pay the preferred depositors not stockholders, in rendering judgment for the plaintiff, such preference could not be secured otherwise than by a stay of the judgment until the preferred creditors should be paid, and it is not objectionable to insert such provision for stay in the judgment. If it amounts to a perpetual stay, because of the insufficiency of the assets, plaintiff is not injured thereby. (Id.)

5. **CHANGE OF LOAN TO ORDINARY CERTIFICATES—NEW DEPOSIT.**—A stockholder who had made a loan to the bank, and received a time certificate, payable in one year, bearing interest, and after its maturity and part payment had surrendered it as paid, and then received an ordinary certificate of deposit for the balance, and upon further payment received another like certificate, which was outstanding when the bank became insolvent, cannot then be considered as a lender of money to the bank, or entitled to share in its assets with preferred depositors not stockholders. The legal effect of the transactions was that each ordinary certificate of deposit issued represented a new deposit made at its date. (Id.)
6. **ASSIGNMENT OF CERTIFICATE—KNOWLEDGE OF INSOLVENCY OF BANK—ASSIGNEE NOT PROTECTED.**—Where the certificate of deposit held by the stockholder when the bank became insolvent was assigned thereafter to the plaintiff, who took the assignment with knowledge that the bank was insolvent, and was in liquidation under the bank commissioners' act, it being admitted that the assignor was a stockholder, the plaintiff is not protected, and is not entitled to share equally with preferred creditors not stockholders. (Id.)
7. **PROTECTION OF DEPOSITING STOCKHOLDERS UNDER BY-LAW—CHANGE OF BY-LAW—REVISION.**—Where an original by-law of the bank entitled stockholders, who were depositors, to share equally in the assets with other depositors, and a subsequent revision of the by-laws was made, in which that by-law was omitted, and the revised by-laws, when adopted, were declared to be the by-laws of the bank, without suggestion that the new by-laws were amendatory of the former by-laws, such original by-law ceased to exist, and did not thereafter apply to the protection of depositing stockholders. (Id.)
8. **ACTION AGAINST BANK—EVIDENCE—PASS-BOOK—HARMLESS RULING.**—In an action against a banking company to recover the balance of an account of money deposited, where the genuineness of the pass-book relied upon was fully established by competent evidence, and it was properly admitted in evidence, the admission of testimony relative to its genuineness, objected to as not the best evidence thereof, is harmless, even if erroneous. (Nicholson v. Randall Banking Co., 533.)
9. **EVIDENCE OF ATTORNEY—GENUINENESS OF PASS-BOOK SHOWN BY CLIENT.**—An attorney may testify to the genuineness of a pass-

BANKS (Continued).

book in the possession of his client, which was exhibited to him by the client, and which the attorney personally knew to be in the handwriting of the cashier of the banking company defendant. Such evidence is not in reference to any privileged communication between the attorney and client, though he advised him with reference to the account. (Id.)

10. **AUTHORITY OF CASHIER—ACQUIESCENCE OF BANKING COMPANY.** Where the banking company defendant, by a long course of acquiescence in the acts of the cashier, has held him out as having authority to do those acts, it cannot afterward repudiate them; and it is immaterial whether he had or had not power to do them merely by virtue of his position as cashier. (Id.)
11. **TRANSFER OF DEPOSIT ACCOUNTS FROM FORMER BANK—ACTION OF CASHIER—ESTOPPEL OF BANKING COMPANY.**—Where the business of a former bank kept by the president of the banking company was turned over to it, as successor thereof, and the former bank ceased to do business, and the cashier of the latter issued its own pass-books to the depositors in the former bank for the balance of their accounts, whereupon they became the customers of the banking company, and its cashier, without any objection from its directors, kept those accounts and rendered statements thereof, showing a transfer from the former bank, and its depositors were thereby induced to believe and act upon the belief that their deposits and the accounts thereof had been properly transferred to and assumed by the banking company, it is bound by the action of its cashier, and is estopped from questioning its liability upon such accounts. (Id.)
12. **NEW TRIAL—SURPRISE—REFUSAL OF CASHIER TO TESTIFY.**—The refusal of the cashier to testify for the banking company, when called as its witness, to prove that the plaintiff's testator did not make the deposit in the banking company for which he was credited, on the ground that such testimony might possibly tend to criminate the witness, and that defendants were surprised by such refusal, is not ground for a new trial, where there was no endeavor to compel an answer, and where it fully appeared at the trial that the deposit was made in a former bank, to the business of which the banking company succeeded, and by its acts became responsible for such deposit. (Id.)

BENEVOLENT ASSOCIATIONS.

1. **ORDER OF DRUIDS—FORFEITED CHARTER OF SUBORDINATE GROVE—ACTION BY GRAND GROVE AGAINST TREASURER—PARTIES.**—In an action by an incorporated grand grove of the United Ancient Order of Druids to compel the treasurer of a subordinate unincorporated grove which it is alleged had been declared dissolved, and its charter and all of its property forfeited to the grand grove, the alleged defunct grove is not a proper party defendant; but the individuals named as defendants should be regarded

BENEVOLENT ASSOCIATIONS (Continued).

as the only defendants. (Grand Grove of United Ancient Order of Druids of California v. Garibaldi Grove No. 71, 116.)

2. **UNINCORPORATED BENEFIT SOCIETY—RIGHTS OF MEMBERS—EXPULSION—CHARGE AND NOTICE OF HEARING.**—An unincorporated association organized for mutual benefit is a mere aggregate of individuals, called for convenience, like partnerships, by a common name. Its members own its property, and it has no right of expulsion except that based upon the agreement of the members embodied in its charter, constitution, and by-laws. No member can be deprived of his share in the property by expulsion without a specific charge of the violation of particular rules of the association creating the offense charged, and prescribing expulsion as a penalty, and without notice and hearing of such charge. (Id.)
3. **FORFEITURE OF CHARTER—PRINCIPLES INVOLVED—MODE OF NOTICE OF CHARGE AND HEARING.**—The same principles which are applicable to the expulsion of a member are applicable to the expulsion of the subordinate association and its members, and the forfeiture of its charter and property by a superior association. If there is no provision in the charter constitution or by-laws of the association prescribing vicarious service of notice of the charge and hearing thereof upon its officers or designated agents, jurisdiction to forfeit the charter can only be acquired by personal service of such notice upon the members of the subordinate association. (Id.)
4. **CITATION TO FORMER OFFICERS—STIPULATION FOR HEARING—JURISDICTION—DE FACTO SUCCESSORS—DUE PROCESS OF LAW.**—The service of a citation to the accused subordinate grove upon its former officers, whose term had expired eight months previously, and who did no other act after abdicating their offices than to acknowledge service of such citation and stipulate for a hearing of the charge, after their places had been filled by the election of other officers, who were acting as such, could not confer jurisdiction upon the grand grove to forfeit the charter, irrespective of the validity of the election. Such forfeiture would be without due process of law as to the members claiming to be the grove, who were represented by *de facto* officers of their choice, to whom no notice of hearing was given. (Id.)
5. **REPRESENTATION BEFORE TRIAL COMMITTEE—FINDING—JURISDICTION NOT SHOWN.**—A finding that a person named appeared before the trial committee of the grand grove on the part of the defendants, comprising only two of the members of the subordinate grove, under authority given alone by the treasurer defendant, whose authority to bind the members of the subordinate grove does not appear, does not show jurisdiction in the grand grove to forfeit the charter of the subordinate grove. (Id.)

BENEVOLENT ASSOCIATIONS (Continued).

6. **REQUEST FOR NEW COMMITTEE—MISTAKE OF NAME IN RECORD—CORRECTION.**—Where it is not denied that there is a mistake in the record in substituting the name of the treasurer defendant for that of an attorney of the defunct association, who appeared in the grand grove and urged the appointment of a new committee, the appellate court will not rest its decision upon the false statement in the record which might be corrected upon admission of the respondent, or upon order of the court below, or upon motion in that court. (Id.)
7. **JURISDICTION OF GRAND GROVE OVER SUBJECT MATTER—INSUFFICIENT CHARGES.**—Where the charges in the written accusation of the grand grove against the subordinate grove consisted: 1. Of a mere general charge that the offending grove had violated its charter, and had refused to obey the directions and laws of the grand grove; and 2. Of charges of specific acts not appearing in the accusation to be violations of any of the specific provisions of the charter, constitution, or by-laws, or to be acts of the subordinate grove as distinguished from acts of its members—no jurisdiction is shown over the subject matter of any offense which could justify a forfeiture of the charter. (Id.)
8. **FORFEITURE WITHOUT DUE PROCESS OF LAW.**—A forfeiture of the charter and property of the subordinate grove by the grand grove, without sufficient specification of charges to show jurisdiction over the subject matter, and without sufficient notice of hearing to bind the members of the subordinate grove, is in violation of the constitutional provision that no one shall be deprived of property without due process of law. (Id.)

BIGAMY. See Criminal Law, 6-9.

BONDS. See Appeal, 13-16; Elections; Injunction; Mechanics' Liens; Street Assessment, 11, 12; Sureties.

BOUNDARIES.

1. **COUNTY BOUNDARY—RIVER—CHANGE OF COURSE AT BEND.**—An artificial change in the course of a river, which is the established boundary between two counties, made at the neck of a peninsula created by a bend in the stream, whereby a new channel of the river is caused, and the former channel is ordinarily left without a current, cannot operate to change the legal boundary between the counties. (Waters v. Pool, 136.)
2. **LEGAL CHANGE OF BOUNDARY—CHANGED LOCATION OF LAND.**—Subsequent acts of the legislature expressly repealing the former acts establishing the boundary, and indicating an intent to define the boundary anew, and to make the changed course of the river the boundary between the two counties, have the legal effect to

BOUNDARIES (Continued).

change the location of the land lying between the old and new new channels of the river from one county to the other. (Id.)

See Adverse Possession, 1.

BROKERS.

1. **BROKER'S COMMISSION—SALE BY OWNER—VALIDITY OF CONTRACT—CONTINUANCE OF EMPLOYMENT.**—A contract between the owner of real estate and a firm of brokers, making them exclusive agents to sell, and agreeing to pay them a specified commission upon any sale made by them, or by anyone else, including the owner, during the existence of the contract, which was to continue for thirty days and until withdrawn by the owner in writing, is valid and binding upon the owner according to its terms. In the event of a sale by the owner after the thirty-day period, the employment not having been previously withdrawn in writing, he is liable for the agreed commission. (Kimmell v. Skelly, 555.)
2. **CONSTRUCTION OF CONTRACT—SALE NOT A WITHDRAWAL IN WRITING.**—The contract cannot be construed to allow that a sale and deed by the owners should constitute a withdrawal in writing pursuant to the terms of the contract, so as to defeat the broker's commission, which was expressly to be paid in the event of such sale before the withdrawal; and the sale could not constitute a withdrawal before the sale was made. (Id.)
3. **CONSIDERATION—SERVICES OF BROKERS—FINDING OF PURCHASER.**—The consideration for the contract of the owner to pay a commission upon their own sale during the existence of the contract consisted of the agreed services of the brokers in attempting to find a purchaser. If they performed such services, the fact that no purchaser was found by them cannot defeat the contract, which was more than an ordinary broker's contract. The parties were at liberty to make the compensation of the broker depend upon any lawful condition agreed to in the contract; and the only question in such case is as to what the contract provides. (Id.)
4. **FRAUD OR MISTAKE—NEGLECT OF OWNER TO READ CONTRACT—RELIANCE UPON STATEMENTS OF BROKERS.**—The neglect of the owner, who had the ability to read the contract and who was furnished with a copy thereof, to read it in its entirety before signing it, and her reliance upon the statements of the brokers as to its contents, is only proof of negligence upon her part, and cannot entitle her to set aside the contract on the ground of fraud or mistake. There was no special relation of trust or confidence between the owner and the brokers; and she was not entitled to rely upon their statements as to the contents of the contract. (Id.)

BROKERS (Continued).

5. **INADMISSIBLE EVIDENCE—ACTION FOR BROKER'S COMMISSIONS—ORAL MODIFICATION OF CONTRACT—SALE OF NOTES—MATERIAL ERROR.**—In an action to recover broker's commissions upon the sale of real estate payable under the terms of the written contract when the purchase money was paid, where the plaintiff alleged an oral modification of the contract that the commissions would be paid when he obtained a purchaser for the notes, and that he had obtained such purchaser, evidence for the defendant to prove the amount received from the sale of the notes is erroneous in any phase of the case. The admission of such evidence, after objection, shows that the court deemed it material, and an order granting a new trial for the error will be affirmed upon appeal. (Marsteller v. Leavitt, 149.)
6. **MATURITY OF COMMISSIONS—SALE OF NOTES—DISCOUNT—EVIDENCE NOT HARMLESS.**—If it be conceded that, as matter of law, the sale of the notes by the defendant, *ipso facto*, rendered the claim of plaintiff for commissions due, and that the facts stated in the complaint would support a recovery upon that theory, the right of recovery cannot be denied merely because defendant may have sold the notes at a discount; and the admission against plaintiff's objection of inadmissible evidence of the amount received at the sale of the notes cannot be said to be harmless. (Id.)

BURGLARY. See Criminal Law, 10-16.

CHATTEL MORTGAGE. See Mortgage, 31-34.

CLAIM AND DELIVERY.

1. **FINDINGS—AGGREGATE VALUE OF PROPERTY.**—In an action of claim and delivery, where the complaint alleged only the aggregate value of all the articles of property claimed, and they were returned to the defendant, in whose favor judgment was rendered, it was not necessary for the court to find the value of each article of the property claimed, but a finding of their aggregate value was sufficient. (Black v. Hilliker, 190.)
2. **OWNERSHIP OF DEFENDANT—CONFLICTING EVIDENCE—CHOICE OF ARTICLES BY PLAINTIFF.**—A finding that the defendant was the owner and entitled to possession of the property claimed and demanded by the plaintiff, made upon conflicting evidence, cannot be reviewed upon appeal; and in view of such finding, the plaintiff has no right to choose to retain any part of the articles replevied and to pay to defendant the value thereof. (Id.)
3. **RECOVERY BY DEFENDANT—RETURN OF PROPERTY—DAMAGES.**—Where the property claimed was not delivered to the plaintiff, but returned to the defendant, and there is no proof that the defendant expended any time or money in the pursuit of the

CLAIM AND DELIVERY (Continued).

property, the defendant recovering judgment is not entitled to recover any damages either for the taking and withholding of the property under section 667 of the Code of Civil Procedure, nor for the conversion thereof under section 3336 of the Civil Code. Both of those sections are inapplicable in such case. (Id.)

4. **COUNSEL FEES FOR DEFENSE OF ACTION.**—The defendant is not entitled to recover as damages the services rendered by counsel to appear for and represent the defendant generally in defending the action. (Id.)
5. **ALTERNATIVE JUDGMENT—TENDER OF PROPERTY—EXECUTION FOR VALUE—DENIAL OF MOTION FOR RECALL—APPEAL—RELIEF IN EQUITY.**—Where the defendant in an action of claim and delivery recovered judgment for the return of the property or its value, and the plaintiff tendered the property and costs in satisfaction of the judgment, which was refused, and the defendant issued execution for its value, which the court refused to recall on plaintiff's motion, the plaintiff who has appealed from the order denying such motion may maintain an action in equity to enjoin further proceedings under the judgment, pending the determination of the appeal. (Eppinger v. Scott, 275.)
6. **EFFECT OF DENIAL OF MOTION—AUTHORITY OF EQUITY.**—The denial of the motion to recall the execution in the action of claim and delivery gives to the court of equity the same authority to interfere as if the court in that action was powerless to render aid. (Id.)

See Pleading, 1-8.

CLERK OF COURT.

1. **COST BILL—TIME FOR FILING—DELIVERY OF FINDINGS AND JUDGMENT TO CLERK—NONFILING—NONPAYMENT OF CALENDAR FEE.**—A cost bill filed and served within five days after delivery of the decision and judgment to the clerk cannot be stricken out because the clerk failed to indorse any filing upon the decision and judgment until after the filing of the cost bill, upon the alleged ground that the calendar fee had not been paid. (Beck v. Pasadena Lake etc. Co., 50.)
2. **NONPAYMENT OF FORMER FEE—DUTY OF CLERK AS TO NEW SERVICE.**—The clerk cannot, because of the nonpayment of a former fee which he had neglected to demand in advance, properly refuse to perform a new service which it is his duty to perform. It was the duty of the clerk to file the findings and judgment when they were delivered to him to be filed, without regard to the unpaid calendar fee. (Id.)
3. **NEGLECT OF CLERK'S DUTY—RIGHTS OF PARTY NOT FORFEITED.**—As a general rule, a party is not to suffer the forfeiture of a right because the clerk has neglected to perform his duty. (Id.)

COMMISSIONS. See Broker.

COMMON CARRIERS. See Railroads; Telegraph Companies.

COMPROMISE.

1. **COMPROMISE OF PREVIOUS SUIT—SPECIFIC PERFORMANCE—MORTGAGE OF REAL ESTATE—TITLE—BENEFICIAL INTERESTS OF THIRD PARTIES.**—In an action to enforce the specific performance of a compromise of a previous suit brought by the same plaintiffs against the same and other parties defendant to enforce a trust against one who is defendant in both actions, in favor of an orphan asylum as an alleged corporation—by which compromise it was stipulated that the corporation had no existence, and that all the real estate in controversy belonged to such defendant, as legal owner, and that a specified piece thereof should be mortgaged and specified sums be paid to the plaintiffs—a decree requiring her to mortgage the entire interest in that property is proper. Any beneficial interests asserted by her to be in codefendants in the previous suit, not made parties to the present action, by reason of an alleged trust declared in the articles of incorporation in favor of a society of which such codefendants were members, are not to be considered in enforcing such compromise. (*Wall v. Mines*, 27.)
2. **INTERESTS IN UNINCORPORATED SOCIETY NOT INVOLVED.**—The interests of third persons as members of an unincorporated society which is not made a party to either action, no issue respecting which was presented or drawn in question apart from the illegal corporation are not involved, and cannot be considered. (*Id.*)
3. **RIGHTS OF CODEFENDANTS NOT MADE PARTIES—FINDING—REVIEW UPON APPEAL.**—Codefendants in the former suit not made parties to the present action cannot be bound by the judgment therein; and the appellants cannot be heard to complain of any finding made by the court against the existence of any interests of such codefendants in the property involved in this action, no proof of which was given on the trial. (*Id.*)
4. **INEFFECTIVE DEED TO ILLEGAL CORPORATION—GRANTEE NOT IN ESSE—WANT OF DELIVERY AND ACCEPTANCE.**—A deed made by the defendant to the alleged incorporated orphan asylum, prior to the compromise, for the purpose of defeating it, is ineffective and void for want of a grantee *in esse* to take under it; and there can be no delivery of such deed to the illegal corporation or any officer thereof, nor any acceptance thereof, express or implied, and no acceptance can be presumed from the beneficial character of the grant. (*Id.*)
5. **MINOR PARTIES TO COMPROMISE—REPRESENTATION BY GUARDIAN AD LITEM—RATIFICATION AFTER MAJORITY.**—The fact that some of the parties to the compromise were minors cannot invalidate it, where they had no general guardian, and were represented in the

COMPROMISE (Continued).

compromise by their guardian *ad litem* duly appointed, who assisted in negotiating the compromise, and where his acts were solemnly and expressly ratified by them after becoming of age, in open court and by deeds made in pursuance of the compromise, and by participating in efforts to enforce it. (Id.)

6. **CONSIDERATION OF COMPROMISE AS TO APPELLANT—ADEQUACY AND FAIRNESS—FINDING AS TO PERSONS NOT PARTIES.**—Where the consideration for the compromise as to the appellant against whom it was enforced is manifestly adequate, fair, and reasonable, and the result of the litigation is to leave all of the title to the property involved in the former litigation in such appellant, it cannot be complained upon the appeal that codefendants in the former suit, as to whom the consideration for the compromise is also found to be fair and adequate, are not made parties to the present action, and are not bound by the decree, and do not share in the results of this action. (Id.)

See Attorneys at Law, 6, 7.

CONSTITUTIONAL LAW.

1. **PROPOSED CONSTITUTIONAL AMENDMENT—CHANGE IN JUDICIAL SYSTEM—DUTY OF SECRETARY OF STATE—INJUNCTION.**—It was the official duty of the secretary of state at least twenty-five days prior to the last general election, to certify to the several county clerks of the state the proposed constitutional amendment No. 22 to article VI of the constitution, relating to a change in the judicial system, recommended at the last regular session of the legislature on March 18, 1899; and he cannot be enjoined from such certification at suit of the people. [Temple, J., and Harrison, J., dissenting.] (People ex rel. Attorney General v. Curry, 82.)
2. **AMENDMENT PROPOSED AT SPECIAL SESSION.**—Amendment No. 1 to the constitution, relating to a change in the judicial system, proposed at the special session of the legislature on February 10, 1900, was not effective, not having been included in the proclamation convening the legislature in that session, and that proposed amendment could not supersede the previous amendment No. 22, proposed at the regular session of the legislature in 1899. (Id.)
3. **LIMITATION OF POWER AT SPECIAL SESSION.**—The legislature has no power to legislate on any subjects at a special session other than those specified in the proclamation convening it in extraordinary session. Although the proposing of a constitutional amendment is not ordinarily legislation, yet it is the exercise of a legislative function, and cannot be lawfully done at a special session, if not specified in the governor's proclamation convening the legislature. (Id.)

 CONSTITUTIONAL LAW (Continued).

4. **LAW FOR SUBMISSION OF CONSTITUTIONAL AMENDMENTS—REPEAL OF ACT OF 1883—UNCONSTITUTIONAL RE-ENACTMENT—TITLE.**—In the act of 1899 repealing the act of 1883 to provide for the submission of proposed amendments to the constitution to a vote of the people, the section purporting to re-enact the first section of the act of 1883 is unconstitutional, as not being expressed in the title of the repealing act. (Id.)

5. **CONSTRUCTION OF POLITICAL CODE—TIME FOR SUBMISSION OF PROPOSED AMENDMENT.**—The amendments of 1899 to sections 1195 and 1197 of the Political Code, providing for the certification of a proposed amendment of the constitution by the secretary of state to the clerk of each county in the state "not less than twenty-five days before election," and providing for the printing of the question of adopting or rejecting the amendment upon the ballots, are to be construed as providing for the submission of the proposed amendment at the next general election after the proposal of the amendment. [Temple, J., and Harrison, J., dissenting.] (Id.)

6. **REASONABLE INTERPRETATION OF STATUTES—PRESUMPTION.**—The interpretation of statutes must be reasonable, and lean strongly to avoid absurd consequences and even great inconvenience; and it is to be presumed that the legislature intended to impart to its enactments such a meaning as would render them operative and effective. (Id.)

See Banks, 3; Gambling Contract, 2, 3, 9, 10, 20; Irrigation District, 2, 3; Municipal Corporations, 1; Street Assessment, 10.

CONTEMPT.

1. **BIAS AND PREJUDICE OF JUDGE—MOTION FOR CHANGE OF JUDGE.**—Since the amendment of 1897 to section 170 of the Code of Civil Procedure, making the bias and prejudice of the judge a ground of objection to his competency to try a cause, a party making such an objection may file affidavits in support of his motion for a change of trial judges without being guilty of a contempt, unless he purposely includes matters wholly irrelevant and immaterial, and which are justly offensive to the judge who must pass upon the motion. (Works v. Superior Court, 304.)

2. **HOSTILITY OF JUDGE TO ATTORNEY.**—Since the passage of such amendment, an attorney at law who appears for a party objecting to a trial judge on the ground of his alleged bias and prejudice is not guilty of contempt in causing to be inserted in the moving affidavits the fact that he, as the attorney for the moving party in another case, had filed a brief in the supreme court, which the trial judge had regarded as a reflection upon himself, and that the judge had since refused to speak to the attorney. Such fact,

CONTEMPT (Continued).

though by no means conclusive, is relevant and material on the question of bias and prejudice. (Id.)

See Criminal Law, 27.

CONTRACT.

1. **ACTION FOR SERVICES—SECURING CONTRACT FOR SALE OF LAND—REFUSAL OF INSTRUCTION COVERED BY CHARGE—DISPUTE AS TO SERVICES.**—In an action for services rendered by the plaintiff to the defendant in securing for defendant a contract for the sale of land, the refusal of an instruction requested by the defendant that if the solicitations of the defendant had in no way influenced the securing of the contract, and that if the party making the contract had prior to such solicitations placed the property for sale with the defendant, or had determined to do so, the jury should find for the defendant, is not ground for reversal, where the language used in the instructions given and not objected to was broad enough to cover the disputed point whether the plaintiff was instrumental in bringing the sale of the property to the defendant, and plainly presented that question to the jury. (*Sutro v. Easton, Eldridge & Co.*, 339.)
2. **DOUBT AS TO TERMS OF CONTRACT—VERDICT TO APPELLANT'S ADVANTAGE.**—When the evidence showed that plaintiff had had different contracts with the defendant as to the securing of contracts of sale, one for one-third of defendant's commissions, and one for one-half thereof, and there was doubt as to which contract was applicable to the case, the appellant cannot urge error in a verdict to his advantage for one-third of the commission, instead of one-half thereof as claimed by the plaintiff. (Id.)
3. **CONTRACT TO PAY JUDGMENT—ASSIGNMENT OF CONTRACT AND JUDGMENT—ACTION BY ASSIGNEE—STATUTE OF LIMITATIONS.**—An action by the assignee of a written contract by which the defendant agreed, in consideration of the transfer of a mine to him by plaintiff's assignor, to pay a judgment against such assignor in favor of a third person, who also assigned the judgment to the plaintiff, does not rest upon the judgment, but upon the written contract, and is not barred by the lapse of five years from the entry of the judgment, if commenced within four years from the date of the contract. (*Hawk v. Barton*, 654.)
4. **CONTRACT NOT ONE OF INDEMNITY—ORIGINAL PROMISE.**—The contract to pay the judgment in consideration of the transfer of the mine is not one of indemnity, but is an original promise upon which an action may be brought by the owner both of the contract and judgment without having first, or at all, to look to the judgment debtor. (Id.)
5. **ACTION UPON CONTRACT—DEMURRER AS TO LIMITATION OF JUDGMENT—QUESTION NOT PRESENTED.**—In an action upon the written

CONTRACT (Continued).

- contract, to pay the judgment, a demurrer improperly pleading the limitation of five years applicable to an action upon a judgment does not present the question whether the defendant can, by proper plea, urge against his liability on the contract that the judgment was barred before it was assigned to the plaintiff. (Id.)
6. **GOODS SOLD—TERM OF CREDIT—EVIDENCE.**—Where goods are sold on credit, an action cannot be maintained for the purchase price until after the expiration of the term of the credit. In this case the evidence shows a sale on credit and that the action, as to a part of the purchase price, was commenced before the term of the credit had expired. (Rauer v. Merani, 616.)
7. **PERFORMANCE—LIMITATION OF TIME—DAMAGES.**—A contracting party is not excused, either at law or in equity, from performing his contract within the time agreed upon. The other party may always recover any damages suffered in consequence of the failure to perform the contract within the time limited. (American Type Founders' Co. v. Packer, 459.)
8. **CONTRACT TO BUILD PUMPING PLANT—ACTION AT LAW—ERRONEOUS FINDING.**—In an action at law to recover the price stipulated in a contract to build a pumping plant alleged to have been fully performed by the contractor, a finding that the time fixed in the contract for its completion was not of the essence of the contract is erroneous and has no force. (Id.)
9. **FAILURE TO COMPLETE CONTRACT AS AGREED—RIGHT OF RESCISSION DEPENDENT UPON CIRCUMSTANCES.**—In certain contracts a failure to perform strictly according to contract, as to time, does not authorize the other party to rescind; but time is of importance, as a general rule, in an agreement to construct machinery or to render services. Whether the defendant has the right to rescind the contract depends upon whether the circumstances show a slight omission or imperfection, not of the substance of the contract, which might be recouped in damages, or whether there was such a material failure to complete the contract as, under the circumstances, would justify a rescission. (Id.)
10. **SUBSTANTIAL FAILURE TO PERFORM—RIGHT OF TEST AND REJECTION—RESCISSION EFFECTED.**—Where it appears that there was a substantial and palpable failure to complete the contract sued upon, and to turn over to the defendant the pumping plant in a condition to be tested for thirty days, with a right of rejection thereof by the defendant, under the terms of the contract, if it was found not fulfilled (in which case the contractor was to remove it at his own expense), the service of a notice of rescission of the contract by the defendant, after the failure to perform was complete, effected a rescission, which precludes a recovery of the contract price. (Id.)

CONTRACT (Continued).

11. **FINDINGS AGAINST EVIDENCE—RESCISSION SHOWN.**—The evidence reviewed, and findings that the contract was completed and that the pumping plant was turned over to the defendant to be tested under the terms of the contract, and that he failed to test it, held against the evidence; and further held that the court ought to have found from the evidence that the rescission of the contract was full and complete. (Id.)

See Brokers; Compromise; Corporations, 7; Duress; Gambling Contract; Interest, 2; Mechanics' Liens; Place of Trial, 1, 2; Specific Performance; Statute of Frauds; Statute of Limitations, 1; Sureties; Telegraph Companies; Trust, 14; Warehouseman; Water and Water Rights, 3.

CONVERSION.

1. **ACTION FOR CONVERSION—FINDING OF OWNERSHIP.**—In an action for damages for the conversion of grain, a finding that on the first day of a certain month the plaintiffs were the owners of and entitled to the possession of the grain, and that "while the said grain was so the property of the plaintiffs" the defendants, between said date and the first day of the next month wrongfully took said grain and converted it to their own use, sufficiently shows that at the time of the conversion the grain was the property of the plaintiff. (Newlove v. Pond, 342.)
2. **LEGAL PRESUMPTION—CONTINUANCE OF OWNERSHIP.**—It is a legal presumption that the ownership specifically found on the day named, in the absence of any finding to the contrary, continued up to the time of the conversation. (Id.)
3. **LEASE FROM AGENT—TERMINATION OF AGENCY—NOTICE FROM OWNER—UNAUTHORIZED DELIVERY OF GRAIN AS RENTAL.**—The right and obligation of tenants to deliver grain as rental to an agent of the plaintiff from whom the premises were leased, is terminated by a notice from the owners that the agency had ceased, and that the tenants were forbidden to deliver any grain as rental to such former agent; and upon a subsequent delivery of part thereof to him, the tenants and the former agent are liable to the owners for a conversion of the grain so delivered. (Id.)

See Damages, 1, 2; Estates of Deceased Persons, 10; Statute of Limitations, 6.

CORPORATIONS.

1. **ACTION UPON JOINT AND SEVERAL NOTE—EXECUTION BY CORPORATION—GENUINENESS OF SIGNATURES—ADMISSIONS OF ANSWER—DENIAL OF EXECUTION.**—In an action upon a joint and several note, signed by a person designated as president of a corporation defendant, and by the same person designated "personally," where

CORPORATIONS (Continued).

the note was set out in the complaint and the delivery of it was not denied, and there was no denial of the signatures of the person so designated in the note, a mere denial of the execution of the note by the corporation amounts only to a denial of its subscription of the instrument, which was not alleged, and the answer must be construed as admitting the genuineness of the actual signatures to the note. (*McCormick v. Stockton etc. R. R. Co.*, 100.)

2. **EVIDENCE—FAILURE TO OBJECT TO NOTE—OFFICIAL RELATION ADMITTED—SUPPORT OF FINDING.**—The placing of the note in evidence without objection, and with the admission made by the defendants that the person who signed the note was the president of the corporation, was in effect and admission of the genuineness of signatures of such person; and it was not necessary that the plaintiff should prove such signatures in order to support a finding that such person “made, executed, and delivered” the note to plaintiff. (*Id.*)
3. **AUTHORITY OF PRESIDENT—RESOLUTION OF BOARD.**—A resolution of the board of directors of the corporation defendant conferring on the president, as “the agent and chief executive of the board,” the power “to incur indebtedness, to negotiate loans, to enter into contracts and agreements, . . . and otherwise to act as agent of the corporation,” is within the powers of the board, and confers upon the president the power to execute a note of the corporation. (*Id.*)
4. **BY-LAW—SIGNATURE OF SECRETARY.**—A by-law of the corporation providing that the notes or obligations “signed officially by the president and secretary shall be binding on the corporation” does not necessitate the signature of the secretary in order to bind the corporation by a note which the board has authorized the president to execute. (*Id.*)
5. **NOTE BINDING UPON CORPORATION.**—The joint and several note so executed by the same person, followed by the designation of such person as president of the corporation defendant, and again followed by the designation “personally,” clearly shows that the first signature was for the corporation, as distinguished from the second personal signature; and the president having power to bind the corporation, the note assigned is a clear, intentional, and legally sufficient exercise of that power, and is binding upon the corporation. (*Id.*)
6. **UNAUTHORIZED NOTE—RATIFICATION.**—A promissory note of a corporation, executed in its name by its president for a valuable consideration, to another corporation of which he was also the president and a large stockholder, although not formally authorized by a resolution of the board of directors, may be subsequently ratified by the corporation so as to become a valid obligation against it. And such ratification is shown, if the transaction in connection with which the note was given is fully entered in the books of the

CORPORATIONS (Continued).

corporation, and notice thereof thus imparted to it, and thereafter for a space of seven months the corporation takes no steps to disaffirm the note, and retains the consideration for which it was given. (*Phillips v. Sanger Lumber Co.*, 431.)

7. **NOTE TO PRESIDENT—VOIDABLE CONTRACT—RESCISSION—RETURN OF CONSIDERATION.**—Where the president of a corporation has the power to execute notes in its name, a note so executed by him, for a valuable consideration moving to the corporation, in a transaction in which he has an interest adverse to it, is not void, but voidable only at the option of the corporation. The right of the corporation in such a case is merely the right to rescind, and this it cannot do without restoring the consideration for the note. (*Id.*)
8. **SPECIAL MEETING OF DIRECTORS—NOTICE—INVALID MEETING.**—Where the by-laws of a corporation do not designate the person by whom notice of a special meeting of the board of directors is to be given, the requirements of section 320 of the Civil Code apply, and the notice must be given by the secretary; and the acts of a mere majority of the directors present at a special meeting, of which no such notice was given to the absentees, and the minutes of which were never subsequently ratified as required by the by-laws, are not valid acts of the corporation. (*Curtin v. Salmon River etc. Ditch Co.*, 345.)
9. **QUORUM—DIRECTOR INTERESTED IN TRANSACTION.**—The provision of section 308 of the Civil Code, to the effect that a majority of the directors of a corporation is a sufficient number to form a board for the transaction of business, is to be construed in connection with the provision of section 305 of that code, to the effect that unless a quorum of the board is present and acting, no business performed or act done is valid as against the corporation; and each of these provisions is limited by the principle that a director shall not participate in any act in which his personal interest is antagonistic to that of the corporation. (*Id.*)
10. **MORTGAGE TO INTERESTED DIRECTOR.**—A meeting of the directors of a corporation, at which there is a mere majority of the members of the board, cannot authorize the execution of the corporate note and mortgage to one of the directors present, as security for a past indebtedness due to him from it. And it is immaterial whether the director personally interested did or did not vote for the resolution authorizing such action. (*Id.*)
11. **MINING CORPORATION—RATIFICATION OF INVALID MORTGAGE.**—The stockholders of a mining corporation, organized under the laws of the state of California, have no power under the provisions of the act of April 23, 1880, to ratify an attempted mortgage of the min-

CORPORATIONS (Continued).

- ing property of the corporation, which is invalid by reason of a want of authorization of the board of directors. (Id.)
12. **SALE OF CATTLE TO SUPERINTENDENT OF CORPORATION—ACTION AGAINST CORPORATION—SUPPORT OF VERDICT—CONFLICTING EVIDENCE.**—In an action against a corporation, whose business it was to purchase cattle, and which transacted all of its business in the county through its superintendent, to recover the purchase price of cattle sold, where the evidence was conflicting as to whether the purchase was made by the superintendent as actual or ostensible agent for the corporation, or for himself individually, a verdict against the corporation will not be disturbed upon appeal. (Lake Shore Cattle Co. v. Modoc Land etc. Co., 669.)
 13. **INDIVIDUAL NOTE OF SUPERINTENDENT.**—The fact that the superintendent who purchased the cattle from plaintiff gave his individual note to the plaintiff for the balance of the purchase price is merely a circumstance in favor of the corporation defendant, but is not conclusive of the issue whether the corporation defendant made the purchase. (Id.)
 14. **EVIDENCE OF SIMILAR PURCHASES BY SUPERINTENDENT.**—Evidence is admissible to show that the superintendent of the corporation defendant had made similar purchases of cattle from other persons for the corporation in his own name. (Id.)
 15. **PROOF OF AGENCY—DECLARATIONS—TESTIMONY OF SUPERINTENDENT.**—The superintendent of the defendant corporation may testify to his agency and to purchases of cattle made by him for the corporation and reported to it; and such testimony is not subject to the objection that the agency of the superintendent cannot be proved by his declarations. (Id.)
 16. **BOOKS OF SUPERINTENDENT—REPORTS OF ACCOUNTS.**—The books of account between the superintendent and the corporation, in so far as included in reports made by him to the corporation, whether strictly admissible or not, are harmless, and where other entries not reported are of slight importance, there is no prejudicial error in their admission in evidence. (Id.)
 17. **ACTION AGAINST STOCKHOLDER—PLEADING—CREATION OF INDEBTEDNESS OF CORPORATION—BALANCE DUE—AMBIGUITY—WAIVER.**—An averment in a complaint against a stockholder for his proportionate share of the indebtedness of a corporation that the corporation became indebted in a certain amount on a specified day, being a balance due for certain work, is a sufficient averment of the creation of the indebtedness on the day specified as against a general demurrer; and the statement as to its being a balance due creates only an uncertainty or ambiguity as to the mode in which the indebtedness was incurred, which is waived by failure to demur on that ground. (Duke v. Huntington, 272.)

CORPORATIONS (Continued).

18. **AVERMENT OF COMMON OWNERSHIP OF STOCK—EVIDENCE AND FINDING OF EXCLUSIVE OWNERSHIP.**—An averment that a certain amount of stock was held in common by the defendant and others when the indebtedness was incurred, warrants the admission of evidence, and a finding based thereon, that that amount of stock was then entirely owned by the defendant. (Id.)
19. **IMMATERIAL VARIANCE—AMENDMENT OF COMPLAINT NOT REQUIRED.** The variance in such case, between the pleading and the proof, not being such as to mislead the defendant in maintaining his defense, was immaterial, and the court was authorized to find the fact according to the evidence, without an amendment of the complaint. (Id.)
20. **OWNERSHIP OF STOCK IN NAME OF ANOTHER.**—Under section 322 of the Civil Code, a stockholder is liable for his proportionate amount of the indebtedness of the corporation, not only for the stock standing in his name on the books, but also for all the stock owned by him which stands on the books in the name of another person. (Id.)
21. **ORPHAN ASYLUM—EXISTENCE DE FACTO—SUPPORT OF FINDING.**—A finding that an orphan asylum is not a *de facto* corporation is sustained by evidence tending to show that there were no meetings of the members or trustees, no election of officers, no by-laws adopted, no certificates of shares or membership issued, no seal adopted or used, no records or minutes kept, and no corporate acts of any character performed, and that the institution was managed after as it had been before the attempt to incorporate. (Wall v. Mines, 27.)
22. **BENEVOLENT CORPORATION DE JURE—VERIFICATION OF ARTICLES—AFFIDAVIT—MANDATORY STATUTE.**—In order to constitute a benevolent corporation *de jure*, the articles of incorporation must be verified as required by section 290 of the Civil Code; and there can be no verification within the meaning of that section requiring that certain facts to be set forth in the articles “must be verified by the officers conducting the election” otherwise than by affidavit of those officers. The statute requiring such verification is mandatory, and not directory. (Id.)
23. **AUTHORITY OF SECRETARY OF STATE—CERTIFICATE OF INCORPORATION—PREREQUISITES TO VALIDITY—CERTIFICATE OF COUNTY CLERK—COPY OF ARTICLES.**—The secretary of state has no authority to issue a certificate of incorporation without first receiving a copy of the articles of incorporation certified by the county clerk, showing that the steps prerequisite to the assumption of corporate powers have been complied with. (Id.)
24. **CERTIFICATE NECESSARY TO INCORPORATION—CERTIFICATE TO ISSUANCE OF PREVIOUS CERTIFICATE—FAILURE OF PROOF.**—The certificate of incorporation referred to in section 296 of the Civil Code, required to be issued by the secretary of state, is requisite to

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give the incorporation a *de jure* existence. A second certificate signed by him, merely reciting that articles of incorporation were filed in his office on a certain date, on which a certificate of incorporation thereof was issued by him, is not admissible proof of the first certificate, and fails to prove a compliance with the law. (Id.)

25. PLEADING—AVERMENT OF INCORPORATION—FORMER ACTION.—The averment of the incorporation of the orphan asylum intervenor made in the complaint in a former action by the same plaintiffs in which the parties defendant and the issues were not the same, cannot bind or estop the plaintiffs from denying the incorporation of the intervenor in this case. (Id.)
26. AVERMENT OF COMPLAINT AND ANSWER TO INTERVENTION—AMENDMENT OF ANSWER—INCONSISTENCY—DISCRETION—ABANDONMENT OF ISSUE.—Where the complaint of plaintiffs and the answer of plaintiffs to the intervention of the orphan asylum alleged its incorporation, the court had discretion to allow the answer to the intervention to be amended by denying its incorporation, notwithstanding the inconsistency of the averments. Though the complaint ought also to be amended likewise, yet the failure to do it being immaterial to the issue between plaintiffs and defendants, the amendment of the answer to the intervention may be deemed as in effect an abandonment of the issue presented by the complaint. (Id.)
27. INVALIDITY OF TRUST—INVALID CORPORATION.—No valid trust can be created in favor of third parties as members of an unincorporated society in a corporation which has no legal existence *de facto* or *de jure*; and third parties cannot have an interest in property as members of an alleged corporation which has no interest in such property. (Id.)

See Banks; Benevolent Associations; Compromise, 1, 2, 4; Estates of Deceased Persons, 4-7; Gambling Contracts, 8; Jurisdiction; Mortgage, 21; Place of Trial, 1, 2; Telegraph Companies; Water and Water Rights, 1-7.

COSTS.

1. AMENDMENT OF MEMORANDUM.—After the expiration of the time limited by section 1033 of the Code of Civil Procedure for serving and filing a memorandum of costs, an amendment of such memorandum cannot be had so as to insert additional items of disbursement, nor can a judgment for such additional items be rendered, in the absence of a showing that the omission was excusable on some of the grounds mentioned in section 473 of that code. (Galindo v. Roach, 389.)
2. INSURANCE ON ATTACHED PROPERTY.—Expenditures made by a sheriff for fire insurance premiums on property attached are not proper items of costs. (Id.)

COSTS (Continued).

3. **PREVIOUS TRIALS.**—The party ultimately prevailing in an action is entitled to recover from the defeated party the costs of previous trials, in so far as they are legitimate and properly taxed. (*Senior v. Anderson*, 290.)
4. **MOTION TO TAX COSTS—NOTICE—SPECIFICATION OF OBJECTIONS—AFFIDAVITS—EVIDENCE AT HEARING.**—It is sufficient in the notice of a motion to have the costs taxed by the court, under section 1033 of the Code of Civil Procedure, to specify certain items of costs in the cost bill as objected to, and to state that they are not legally chargeable as costs, and were not necessary disbursements in the action. It is not necessary that any affidavits should accompany the notice, but upon the hearing of the motion any competent evidence, oral or written, may be presented to the court. (*Id.*)
5. **UNAUTHORIZED COSTS—REPORTER'S TRANSCRIPT—COPIES OF PAPERS WITHDRAWN.**—Items of costs paid without consent of the parties or order of the court, for a transcript of the reporter's notes and for copies of excluded papers withdrawn, are improper, and should be rejected upon taxation of costs. (*Id.*)
6. **COPIES OF PAPERS FROM LAND OFFICE NOT USED—ABSENCE OF EXPLANATION.**—An item of cost paid for copies of numerous papers from the commissioner of the general land office, which were not offered in evidence, and the need of which was not explained nor shown to have been reasonably apprehended, should be stricken out. (*Id.*)

See Appeal, 1, 2; Clerk of Court; Way, 7.

COUNTY.

ACTION BY COUNTY—PLEADING—STYLE OF NAME—CERTAINTY.—An action by a county is properly brought by styling the name of the plaintiff as "The county of" the name specified; and the complaint is not subject to a demurrer for uncertainty in so styling the county plaintiff. (*County of Sutler v. McGriff*, 124.)

See Boundaries; Eminent Domain, 6; Mandamus, 3, 4; Office and officers.

COURTS. See Justice's Court.**CRIMINAL LAW.**

SETTING ASIDE INDICTMENT—FAILURE TO RESUBMIT CHARGE—SECOND INDICTMENT.—An order setting aside an indictment or information is no bar to a future prosecution for the same offense; and upon the setting aside of an indictment the failure of the court to order the charge to be resubmitted to another grand jury for examination, as directed by section 997 of the Penal Code, cannot preclude a re-examination thereof by the grand jury, nor affect

CRIMINAL LAW (Continued).

- the validity of a second indictment, which cannot be set aside because of such failure of the court. (*People v. Breen*, 72.)
2. **NAME OF WITNESS UPON INDICTMENT—IDENTITY OF MARRIED WOMAN—CHRISTIAN NAME—HUSBAND'S INITIAL.**—Where the name of "Mrs. E. Osborn" was indorsed upon the indictment, and "Mrs. Susie Osborn" was a witness at the trial, an order refusing to set aside the indictment for failure to indorse the name of the witness thereon is properly refused, where the identity of the witness appears, and the name indorsed upon the indictment merely bore the initial of her husband, who was also a witness before the grand jury. (*Id.*)
 3. **CHARGE OF ARSON—GRAND JUROR'S KNOWLEDGE OF BURNING.**—Upon the trial of a charge of arson, the fact that some of the grand jurors had personal knowledge that the building was burned does not disqualify them from ascertaining whether the building was feloniously destroyed and who was the guilty party, and is not ground for setting aside the indictment. (*Id.*)
 4. **REFUSAL OF FURTHER CONTINUANCE—FAILURE TO SHOW DILIGENCE—DISCRETION.**—Where it appears that more than one continuance had been granted to enable the defendant to prepare for trial, the refusal of another continuance is in the discretion of the court; and although the evidence of the absent witnesses as shown by the affidavit of the defendant is material, yet where such affidavit fails to show diligence to secure their attendance or their affidavits that they would testify to the facts stated, or to show that there was a reasonable probability of procuring their attendance within any reasonable time, it cannot be said that the court abused its discretion. (*Id.*)
 5. **EVIDENCE—CROSS-EXAMINATION—INTEREST OF WITNESS—EMPLOYMENT OF DETECTIVE—AMOUNT OF COMPENSATION—HARMLESS RULING.**—Upon the trial of a charge of arson, where the president of a warehouse company, the building of which was burned, was a witness for the prosecution, and upon cross-examination, for the avowed purpose of showing his interest and the interest of the company in the prosecution, had testified that he was a stockholder therein, and that the company had employed a detective to ascertain the origin of the fire, the disallowing of a further question as to how much was paid to the detective for his services cannot be deemed prejudicial, in the absence of any claim or showing that the witness had any particular feeling or prejudice against the defendant in the matter of such employment. (*Id.*)
 6. **BIGAMY—GENERAL REPUTE OF MARRIAGE.**—Under section 1106 of the Penal Code, in a prosecution for bigamy, general repute of marriage is admissible in evidence as a circumstance tending to show the fact of marriage. (*People v. Hartman*, 487.)
 7. **BELIEF OF INVALIDITY OF FIRST MARRIAGE—INSTRUCTION.**—In such a prosecution, in which the second marriage is admitted, and

CRIMINAL LAW (Continued).

the defendant fully knew what he was doing when he entered into it, the fact that at that time he honestly believed that he had not been married to the woman who was then his wife does not authorize his acquittal, and a requested instruction to that effect is properly refused. Under such circumstances, it was the act of marrying the second time that constituted the crime. (Id.)

8. **SUFFICIENCY OF EVIDENCE OF BIGAMY.**—In a prosecution for bigamy, evidence tending to show cohabitation between the defendant and woman for a great many years, undivided general repute of their marriage, admissions by the defendant of marriage, and some direct evidence tending to show the performance of an actual marriage ceremony, is sufficient to support a finding of fact that the marriage relation did exist between them. (Id.)
9. **ABSTRACT INSTRUCTION—PRIOR COHABITATION.**—While as an abstract proposition of law, evidence of the cohabitation of the defendant with another woman, prior to his alleged second marriage is not sufficient, in a prosecution for bigamy, to warrant the jury in finding that the defendant was ever married to such woman, the refusal of the court to so instruct is not error, when there is much other evidence tending to show the marriage. (Id.)
10. **BURGLARY—INTENT TO COMMIT ARSON—INFORMATION.**—An information for burglary charging that the defendant entered the basement of a certain store "with intent to commit arson" sufficiently charges the offense, and need not state the facts constituting the crime of arson. It is sufficient to allege an entry into a building, room, or apartment, with intent to commit a specific felony. (People v. Goldsworthy, 600.)
11. **MOTIVE FOR ARSON—INSURANCE POLICIES ON DEFENDANT'S PROPERTY—PAROL EVIDENCE.**—In order to establish a motive for the intent of the defendant to commit arson, the fact may be shown that he was engaged in a general merchandise business in the adjoining building, and that his goods therein were insured against loss by fire, and the amount of the policies issued thereon may be proved by parol evidence, especially where it appears that the originals had been canceled and returned to the insurance office. (Id.)
12. **AMOUNT OF POLICIES—EXCESS OVER VALUE—IMPROPER CROSS-EXAMINATION—ORDER OF PROOF—DISCRETION—HARMLESS RULING.**—Where a representative of the board of trade had testified for the defendant that soon after his arrest he inventoried the stock and fixtures of the defendant and valued them at about eleven thousand dollars, though it was not proper cross-examination for the prosecution to prove by him that the aggregate amount of the insurance policies on the property exceeded twelve thousand dollars, yet the order of proof was in the discretion of the court, and the evidence

CRIMINAL LAW (Continued).

being proper testimony in chief for the prosecution, its allowance on cross-examination was not prejudicial to the defendant, and does not constitute reversible error. (Id.)

13. **INSANITY OF DEFENDANT—QUALIFICATION OF EXPERT WITNESS—REJECTION OF EVIDENCE—DISCRETION OF TRIAL COURT—APPEAL.**—In determining the qualification of an expert witness to give an opinion upon the mental soundness of the defendant, the trial court has a broad, legal discretion, and its decision in rejecting his testimony will not be disturbed upon appeal, unless its discretion has been abused and its ruling rejecting the evidence is plainly and indisputably wrong. The fact that this court, if deciding the question at the trial, would, upon the showing made, have allowed the expert to testify, is not the test which should govern this court upon appeal. (Id.)
14. **EVIDENCE OF INSANITY—CHIMERICAL THEORY—REBUTTAL BY EXPERT.**—Where, as tending to show the insanity of the defendant, it was testified that he consulted a boiler-maker as to the feasibility of making a boiler so light, by the use of aluminum, that he could carry it on his back in prospecting tours, the prosecution may prove in rebuttal by a qualified expert witness that the theory or idea of the defendant was not so chimerical or improbable as to indicate mental unsoundness. (Id.)
15. **UNBALANCED MIND—EXCUSE FOR CRIME.**—Evidence indicating a mental change in the defendant, and that he had an unbalanced mind, does not establish an excuse for crime, where, as tested by the rules of the common law, the jury were authorized to find from the evidence that the defendant was not so insane as to be irresponsible. (Id.)
16. **VARIANCE—"BASEMENT ROOM"—"CELLAR."**—The distinction between a "basement room" and a "cellar" may be very slight; and where the defendant is properly charged with entry into a "basement room" with intent to commit arson, and the term "cellar" is not used in the statute, and the evidence sufficiently shows that the place where the arson was attempted was a "room" in a "basement," where merchandise was stored, though called by some of the witnesses a "cellar" as well as a "basement," there is no substantial variance. (Id.)
17. **FORGERY—UTTERING FALSE AND FORGED POWER OF ATTORNEY—FRAUDULENT SALE OF BANK ACCOUNT.**—A power of attorney to the defendant, executed by Elmer Geddes, under the name of "E. Geddes," with intent that it should thereby bind and represent Edwin Geddes, for a fraudulent purpose, is false and forged; and the uttering thereof by the defendant by signing the name "E. Geddes, by his attorney in fact, W. E. Rushing," to an assignment of a bank account kept in the name of "E. Geddes," by Edwin Geddes, upon a sale thereof at a discount, with intent to defraud the pur-

CRIMINAL LAW (Continued).

chaser, and with guilty knowledge of all the facts, constitutes the crime of forgery by the defendant under section 472 of the Penal Code. (*People v. Rushing*, 449.)

18. **FORGERY IN SIGNING ONE'S OWN NAME.**—One may be guilty of forgery in signing one's own name to an instrument with the fraudulent intent of making the instrument appear to bind another, and of making the writing purport to be the writing of another bearing the same name, or the same family name and initial. (*Id.*)
19. **FRAUDULENT INTENT AND GUILTY KNOWLEDGE OF DEFENDANT—SUPPORT OF VERDICT.**—Where the circumstances of the case and the proofs are such that the jury could readily infer therefrom that the power of attorney was false and forged, and that the defendant uttered the same with fraudulent intent and guilty knowledge, the verdict of guilty of forgery will not be disturbed. (*Id.*)
20. **EVIDENCE—CONVERSATION OF DEFENDANT—IMPEACHMENT—REBUTTAL.**—Where the defendant on cross-examination denied ever having had a conversation with witnesses named or with any person to the effect that he and Geddes were going on a bank deal, and that if it went through they would have money to burn, the witnesses named may be allowed in rebuttal to testify to such conversation for the purpose of impeachment. (*Id.*)
21. **INSTRUCTION—HYPOTHESIS OF GUILT AND OF INNOCENCE—CIRCUMSTANTIAL EVIDENCE—CRITICISM—ERROR CORRECTED.**—Where the jury were properly instructed that "every fact essential to sustain the hypothesis of guilt and to exclude the hypothesis of innocence must be fully proved," such instruction corrects any error or vice in the remainder of the instruction copied from the opinion in *People v. Cronin*, 34 Cal. 202, relative to a case of circumstantial evidence, since criticised as "inexact and illogical." (*Id.*)
22. **MISCONDUCT OF DISTRICT ATTORNEY AND JUDGE—CONFLICTING AFFIDAVITS—PROVINCE OF JUDGE—DISCRETION—APPEAL.**—Where there were conflicting affidavits as to alleged misconduct of the district attorney and of the judge, the duty of ascertaining the truth therefrom was peculiarly the province of the judge who tried the case, and his decision thereupon will not be interfered with upon appeal unless it clearly appears that his discretion was abused. (*Id.*)
23. **NEWLY DISCOVERED EVIDENCE—DISCRETION—PRESUMPTION.**—A motion for a new trial on the ground of newly discovered evidence is addressed to the discretion of the court, and the presumption is that the discretion was properly exercised in denying the motion, when the affidavits were conflicting, and a strong case was not made by the moving party, both in respect of diligence and as to the truth of materiality of the newly discovered evidence. (*Id.*)

CRIMINAL LAW (Continued).

24. **FORGERY.**—In order to constitute the crime of forgery it is essential that there should be the making of a writing which falsely purports to be the writing of another. (*People v. Cole*, 13.)
25. **CHECK DRAWN BY DEFENDANT.**—An information charging the defendant with uttering and attempting to pass a forged and counterfeited check, which shows upon its face that the instrument alleged to be forged was a check drawn and signed by the defendant himself, does not state a public offense; and the facts that such check purported to be indorsed by the person whose check was alleged to have been forged, and that the defendant had no funds in the bank on which it was drawn, are immaterial. (*Id.*)
26. **GRAND LARCENY—INDICTMENT—DESCRIPTION OF STOLEN PROPERTY—CERTAINTY.**—In an indictment for grand larceny, the description of the property stolen as "four calves, then and there the personal property of Anton Luchessa," is sufficiently certain. (*People v. Warren*, 678.)
27. **CONTINUANCE—INTOXICATION OF COUNSEL—CONTEMPT OF COURT—PREPARATION OF OTHER COUNSEL—DISCRETION.**—The counsel for the defendant cannot, by becoming intoxicated, and incurring a penalty for contempt, after impanelment of the jury, give to the defendant the right to an indefinite continuance of the case. It is in the discretion of the court to allow newly appointed associate counsel a reasonable time for preparation and to refuse a continuance; and where its action was not arbitrary, its discretion will not be interfered with upon appeal. (*Id.*)
28. **TRIAL—CALL OF JURY FOR TESTIMONY—VERDICT BEFORE TIME FIXED FOR READING—DISCRETION OF COURT.**—Upon the request of the jury, while considering the cause, made to the court at 11 o'clock P. M., for the reading of the testimony of a witness for the defendant, which it would require two hours to read, the court did not abuse its discretion by fixing 9 o'clock of the next morning as the time for such reading, and adjourning court until that time; and where the jury, a few moments before the time fixed for the reading, announced their verdict of guilty, and adhered thereto after being polled, the court had discretion to receive their verdict, without the reading of the testimony called for. (*Id.*)
29. **AIDING AND ABETTING CRIME—INSTRUCTIONS—CASE OF ERROR.**—It is error to instruct the jury that one who aids or abets in the commission of a crime may be punished as a principal; but such error is cured by clear and explicit instructions that "all persons who aid and abet in the commission of a crime are principals," and that "in every crime there must exist a union or joint operation of act and intent, or criminal negligence." Under such instructions the jury could not be misled to believe that one who innocently aids in the commission of a crime may be found guilty. (*Id.*)

CRIMINAL LAW (Continued).

30. **GRAND LARCENY—INDICTMENT—DESCRIPTION OF STOLEN PROPERTY—CERTAINTY.**—In an indictment for grand larceny, the description of the property stolen as "four calves then and there the property of Anton Luchessa," is sufficient. (*People v. Warren*, 683.)
31. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—BRANDING OF CALVES—ABSENCE OF DEFENDANT—PRESUMPTION UPON APPEAL.**—Where the evidence adduced at the trial is not set forth in the record upon appeal, and an affidavit on motion for a new trial for newly discovered evidence sets forth the presence of the affiant at the marking and branding of calves by the father and brothers of defendant about a week before the date of the alleged larceny, and that the defendant was not then present, it cannot be presumed upon appeal, in favor of the materiality of the evidence, that the larceny was shown to have been committed at the time of such marking and branding. (*Id.*)
32. **INSUFFICIENT SHOWING FOR NEW TRIAL.**—A motion for a new trial upon the ground of newly discovered evidence is looked upon with disfavor; and where it appears, in view of the affidavit and counter-affidavits, that there is not a sufficient showing of diligence or of the truth and materiality of the evidence to make a strong case in favor of the motion, it is properly denied. (*Id.*)
33. **POSSESSION OF STOLEN PROPERTY—MODIFICATION OF REQUESTED INSTRUCTION—POSSESSION BY CONSENT AND WILL OF ACCUSED.**—An instruction requested by the defendant, upon the subject of the possession of stolen property as a circumstance tending to prove guilt, that "the possession must be personal and exclusive, and must be such as to preclude the inference that the stolen property was in the possession of any other person than the defendant," is properly modified by striking out all after the word "exclusive," and inserting in lieu thereof, "or it must be the possession of some person or persons by the consent and will of the accused, and in either case the possession must involve a distinct and conscious assertion of possession by the accused." (*Id.*)
34. **AIDING AND ABETTING CRIME—CURE OF ERRONEOUS INSTRUCTIONS.**—An erroneous instruction to the effect that persons who have "aided or abetted" in the commission of a crime may be punished as principals is cured by correct instructions upon the subject of aiding and abetting in its commission and as to the burden of proof thereof, where the jury could not, in view of the instructions as a whole, have been misled into the belief that the defendant could be found guilty for an innocent aiding in the commission of the offense. (*Id.*)
35. **HOMICIDE—SELF-DEFENSE—SUPPORT OF VERDICT.**—A verdict of conviction of murder in the first degree cannot be disturbed upon appeal by reason of evidence of self-defense and of the absence of a deliberate intent to take life, where the evidence which bears

CRIMINAL LAW (Continued).

against the defendant, considered by itself and without regard to conflicting evidence for the defendant, tends to support the verdict. (People v. Emerson, 562.)

36. **INSTRUCTION AS TO SELF-DEFENSE—FEAR OF PRESENT DANGER—APPEARANCES.**—The following instruction is correct: "A bare fear that a man's life or limb is in danger is not sufficient to justify a homicide, but in order to justify a man in taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable man, and the party killing must have acted under the influence of such fears alone. The danger must be present, apparent, and imminent, and the killing must be done under a well-grounded belief that it was necessary for the defendant to kill the deceased at that time to save himself from great bodily harm." Such instruction is not inconsistent with correct instructions immediately following as to the right of the defendant to act upon appearances whether the danger was real or only apparent. (Id.)
37. **EVIDENCE OF ACTUAL DANGER—DOCTRINE OF APPARENT DANGER.**—Where the only danger proved in the case is an actual danger, it is not important to impress the jury with the doctrine that an apparent danger may be such as to justify a killing. (Id.)
38. **PLEA OF NOT GUILTY—IMPEACHMENT OF RECORD—ANNOUNCEMENT OF COUNSEL.**—After the jury is impaneled and sworn to try a plea of "not guilty," entered upon the record, as the plea of the defendant, he cannot be permitted to impeach the record by proof that the plea was announced by his counsel, and not by himself. If he stood mute, the entry of such plea was proper. (Id.)
39. **EVIDENCE—CALLING OF WITNESS TO PLACE OF DEATH—CONTRADICTION BY WITNESS—REBUTTAL—REPETITION OF TESTIMONY—HARMLESS RULING.**—Where the prosecution had proved in chief that the son of the deceased, after the shooting, called a witness to the place where his father lay dead, and such witness testified for the defendant that he was called by the son before the shooting, though it may have been a technical error to permit a witness for the prosecution merely to repeat in rebuttal his testimony in chief that the calling took place after the shooting, the ruling permitting it was harmless. It was material to the people's case to rebut the evidence of the witness for the defendant. (Id.)
40. **HOMICIDE—SELF-DEFENSE—SUPPORT OF VERDICT.**—A verdict of guilty of murder will not be disturbed upon appeal, notwithstanding doubt thrown upon the testimony of the only eyewitness to the homicide, which, if believed by the jury would support the verdict, and notwithstanding the corroboration of testimony of the defendant that he acted in self-defense. The truth or falsity of the testimony was matter for the jury to pass upon. (People v. Brown, 591.)

CRIMINAL LAW (Continued).

41. **EVIDENCE—LEADING QUESTIONS—DISCRETION OF TRIAL COURT.**—The trial court has discretion to allow leading questions to be addressed to a witness for the prosecution in his examination in chief, and its discretion will not be interfered with upon appeal, except in a clear case of abuse. (Id.)
42. **HARMLESS RULING—PRELIMINARY QUESTIONS—DYING DECLARATIONS.**—The allowance of preliminary questions asked of a witness with a view to the introduction of the dying declarations of the deceased is harmless, and could not prejudice the defendant, where the dying declarations were not offered in evidence. (Id.)
43. **DECLARATION OF DECEASED—REFUSAL TO STRIKE OUT.**—The refusal of the court of strike out evidence of a declaration of the deceased, made a short time after the shooting, that he was "shot to kill," cannot be prejudicial where it was conceded that defendant fired the fatal shot. (Id.)
44. **MOTIVES—DECLARATIONS OF DEFENDANT—INTIMACY WITH WIFE OF DECEASED.**—For the purpose of proving motive for the murder of the deceased, evidence of the declarations of the defendant tending to show intimate friendship or meretricious relations between him and the wife of the deceased is competent; and the fact that the declarations were of a vague and general character goes to their weight, and not to their admissibility. (Id.)
45. **EVIDENCE OF MOTIVE MATERIAL—PLEA OF SELF-DEFENSE.**—Evidence tending to show a motive for the killing is as material for the state, where the defendant claims that he acted in self-defense, as where the killing is denied. (Id.)
46. **INSTRUCTIONS AS TO DYING DECLARATIONS.**—Abstract instructions as to dying declarations, where none were introduced in evidence, are not ground for reversal; and the refusal to give instructions requested relating to that subject is not erroneous. (Id.)
47. **INAPPLICABLE INSTRUCTIONS.**—Instructions having no application to the facts of the case are properly disallowed. (Id.)
48. **MURDER—EVIDENCE.**—In a prosecution for murder, the evidence, although purely circumstantial, is reviewed and held amply sufficient to sustain a conviction. (People v. Clarke, 642.)
49. **CHARACTER OF SHOTS.**—Where the homicide is shown to have been committed inside of a house, by the shooting of the deceased with a shotgun, a witness for the prosecution, who was outside the house at or about the time the shooting is claimed by the prosecution to have occurred, and who testified to the fact of having then heard shots, may further testify that from the sound of the shots they were made in the house, and sounded like shots fired from a shotgun. The fact that such witness was not an expert cannot be taken advantage of on appeal, in the absence of an objection on

CRIMINAL LAW (Continued).

that ground at the trial, especially when he testifies to his ability to to distinguish by sound between the different kinds of shots. (Id.)

50. **IDENTITY OF PLACE.**—Where a witness for the prosecution has testified that he was at a particular place when he heard the shots fired, and that a few minutes thereafter he saw the defendant come out of the house, and evidence is offered by the defense that the house was not visible from that place, the witness in rebuttal may testify that he pointed out to other witnesses for the prosecution the place where he was when he heard the shots, and such other witnesses may then testify that the house was visible from the place so pointed out. (Id.)
51. **EVIDENCE OF NONKILLING BY ANOTHER.**—Where the evidence shows conclusively that the deceased must have been killed either by the defendant or by another person, the latter may testify that he did not do it. (Id.)
52. **EVIDENCE TENDING TO DEGRADE DEFENDANT.**—To ask the defendant on cross-examination, while a witness in his own behalf, whether at the time of the homicide he was living with a woman who was not his wife is prejudicially objectionable. Such objection is cured, however, if the defendant's own witnesses testify to the same effect. (Id.)
53. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—The order denying a new trial in this case, on the ground of newly discovered evidence, will not be disturbed on appeal. (Id.)
54. **INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE—REASONABLE DOUBT.**—An instruction "that if one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong," and that if the jury "have a reasonable doubt as to which of said conclusions the chain of circumstances leads," they should acquit the defendant, is properly refused, as both of such opposing conclusions might lead to defendant's guilt. (Id.)
55. **RAPE—PREVENTING RESISTANCE—INFORMATION—CERTAINTY—CONJUNCTIVE AVERMENT.**—An information for rape charging that the prosecutrix was prevented from resisting the act "by certain intoxicating narcotic, and anaesthetic substance," administered to her by and with the privity of the defendant, is not demurrable for uncertainty by reason of the conjunctive form of the averment, contrary to the disjunctive enumeration in the statute; though it may be, in such cases, that disjunctive allegation is permissible. (People v. O'Brien, 1.)
56. **UNCONSCIOUSNESS OF PROSECUTRIX—CREDIBILITY—PROVINCE OF JURY.**—The credibility of the testimony of the prosecutrix that she was in a state of unconsciousness before and when the act of sexual intercourse was committed was for the jury to determine, notwithstanding the testimony of other witnesses that she did not appear to be unconscious when she was seen riding with the defendant,

CRIMINAL LAW (Continued).

and other evidence tending to impeach her character for chastity. (Id.)

57. **SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.**—Where there was evidence that the defendant repeatedly administered intoxicating liquor to the prosecutrix, and assumed to drive her home thereafter in the evening, and that after dark, about a mile from the starting place, she was found by witnesses lying on the ground apparently insensible, and was helped into the wagon at the defendant's request, and was taken home in an unconscious state and it appeared that some one had had intercourse with her, and there was other evidence pointing to the defendant as the guilty party, the verdict of guilty cannot be disturbed upon appeal for insufficiency of the evidence to support it. (Id.)
58. **EVIDENCE—LOADED PISTOL TAKEN FROM DEFENDANT.**—Evidence is not admissible to show that several days after the alleged offense a loaded pistol was taken from the defendant by the relatives of the prosecutrix; nor is such pistol admissible in evidence as an exhibit. (Id.)
59. **PREVIOUS CHASTITY OF PROSECUTRIX—EVIDENCE IN CHIEF—INFERENCE—REBUTTAL.**—It is not admissible for the prosecutrix to testify upon her examination in chief that prior to the occasion of the alleged offense she had never had sexual intercourse with anyone. The previous chastity of the prosecutrix should be inferred by the jury in the absence of evidence to the contrary, and can only be proved by way of rebuttal of attacking evidence. (Id.)
60. **INSTRUCTION UPON PRESUMPTION OF CHASTITY—PROVINCE OF JURY—INFERENCE—PRESUMPTION OF INNOCENCE.**—It is error to instruct the jury, upon a prosecution for rape, that "the law presumes a woman to be chaste until the contrary is shown." There may be an inference of previous chastity, and the jury should infer it in the absence of evidence; but the jury is the exclusive judge of the weight and validity of the inference. But there can be no legal presumption of chastity against the presumption of innocence, which must prevail until guilt is proved beyond a reasonable doubt. (Id.)
61. **IMPROPER BASIS OF INSTRUCTION—LANGUAGE OMITTED FROM PUBLISHED OPINION—PRESUMPTION.**—An instruction to the effect that the jury may find on the presumption of chastity against the declarations of any number of witnesses that did not produce conviction in their minds is improperly based on the supposed authority of language used in an opinion, which was omitted in the final publication thereof. It must be presumed that the omission was intentional. (Id.)
62. **INSTRUCTION UPON CIRCUMSTANTIAL EVIDENCE—"PROBABILITIES."**—It is error to instruct the jury on the subject of circumstantial evidence that "when direct evidence cannot be produced minds will form their judgment on circumstances, and act on the probabilities

CRIMINAL LAW (Continued).

of the case." Such instruction implies that the jury may act on less than convincing evidence or without the "moral certainty" required by law. (Id.)

63. **INSTRUCTION COMPARING WEIGHT OF CIRCUMSTANTIAL AND DIRECT EVIDENCE—MATTER OF FACT.**—An instruction relating to the comparative weight or relative value of circumstantial evidence, and the direct evidence of eyewitnesses, improperly charges as to a matter of fact in violation of section 19 of article VI of the constitution. An instruction that eyewitnesses may lie, though true, is not upon a matter of law, but upon a matter of fact for the consideration of the jury, and carries with it an improper implication in favor of other kinds of evidence. (Id.)
64. **POSTPONEMENT OF TRIAL BEYOND SIXTY DAYS—DISMISSAL—"GOOD CAUSE"—ENGAGEMENT IN ANOTHER TRIAL.**—The fact the court is engaged in the trial of another case, the trial of which extends beyond the period of sixty days after the filing of the information, is "good cause," within the meaning of section 1382 of the Penal Code, providing that "the court, unless good cause to the contrary is shown, must order the prosecution dismissed . . . if a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment or filing of the information." (People v. Benc, 159.)
65. **CONSENT OF DEFENDANT TO POSTPONEMENTS.**—The consent of the defendant to postponements of his trial made from time to time, if not equivalent to a delay granted at his request, is "good cause" for the delay within the meaning of section 1382 of the Penal Code. (Id.)
66. **RAPE—CROSS-EXAMINATION OF PROSECUTRIX UNDER AGE—WANT OF CHASTITY—IMPEACHMENT.**—Where the prosecutrix is under the age of consent, her testimony to a forcible rape committed by the defendant, and that no one else had had carnal intercourse with her, cannot be impeached by evidence that she had led an unchaste life. (Id.)
67. **MISCONDUCT OF DISTRICT ATTORNEY—HARMLESS ACTION.**—Alleged misconduct of the district attorney in stating that the defendant's attorney knew he could not prove want of chastity of the prosecuting witness, is harmless; and alleged misconduct on his part in argument in calling the attention of the jury to the fact that certain witnesses were not called for the defense, is not prejudicial, where the statement was stricken out by the court and the jury were instructed to disregard it. (Id.)
68. **EVIDENCE—UNUSUAL APPEARANCE OF PROSECUTRIX—NEARNESS TO EVENT.**—The evidence of a member of the family, who had left the house where the alleged rape was committed early in the morning and who returned to the house within one hour after the occurrence, that he noticed that the appearance of the prosecutrix was

CRIMINAL LAW (Continued).

unusual, that her hair was tousled, her face was red, and that she seemed nervous, was admissible as bearing on the effects of the act charged upon her person, and the time of observation was not so remote from the event as to make the evidence immaterial. (Id.).

69. **TESTIMONY OF PHYSICIANS—SUBSEQUENT CONDITION OF SEXUAL ORGANS.**—The testimony of physicians as to the condition in which the sexual organs of the prosecutrix were found some four to six days after the alleged rape is admissible, the remoteness of the evidence going merely to its probative force, of which the jury were the judges. (Id.)
70. **EXPERT EVIDENCE—POSSIBILITY OF FORCIBLE RAPE—EVIDENCE STRICKEN OUT.**—The testimony of a physician as to the possibility of forcible intercourse between a man and a well-developed girl, weighing one hundred and thirty-eight pounds, without her consenting to the act was properly excluded, as not being the subject of expert evidence; and an opinion given by a physician that a man, however strong, cannot commit the act of coition, with a vigorous, well-developed woman, while she is struggling to prevent it, which was not responsive to the question asked, was properly stricken out. (Id.)
71. **PROPORTION OF TRUE TO FALSE CHARGES OF RAPE—INCOMPETENT EVIDENCE.—REMARK OF COURT.**—The statement of a physician on cross-examination, though not objected to, that medical authorities places the proportion of true to false charges of rape as one to twelve, was so clearly incompetent and improper as to render a remark by the court that that statement would have nothing to do with any particular case, which must stand on its own merits, not legally prejudicial to the appellant. (Id.)
72. **REOPENING CASE FOR PROSECUTION—DISCRETION.**—The court had discretion to allow the district attorney to reopen the case of the prosecution for further testimony; and there is no error in so doing where no abuse of discretion appears. (Id.)
73. **HARMLESS INSTRUCTIONS—MODE OF EXERCISE OF POWERS OF JURY —DETERMINING CREDIT OF WITNESS.**—Instructions relating to the mode of the exercise of the powers of the jury, in determining the credit of a witness or the corroboration of the prosecutrix, which are not untrue or erroneous, except as they may infringe the province of the jury, are harmless, and not prejudicial error, where they merely tell the jury what they evidently knew, or would evidently do, without being so told. (Id.)
74. **REQUESTED INSTRUCTIONS SUBSTANTIALLY GIVEN.**—It is not error to refuse to give proper instructions requested where the court gave instructions to the same effect of its own motion. (Id.)
75. **OPPORTUNITY FOR RAPE—REFUSAL OF INSTRUCTION.**—An instruction requested by the defendant that "the fact that the defend-

CRIMINAL LAW (Continued).

ant may have had an opportunity to commit the rape can have no weight, unless it excludes all reasonable opportunity for its commission by another, and standing alone is insufficient to sustain conviction," was properly refused, because the first part of it is incorrect, and because the instruction infringed upon the province of the jury. (Id.)

76. **CONSENT AND FORCE—INSTRUCTIONS REFUSED.**—The prosecuting witness being under the age of consent, requested instructions involving the subjects of consent and force were properly refused. (Id.)
77. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—Where the prosecutrix testified that she scratched the face of the defendant, and the case had been twice tried, affidavits of persons who met the defendant from one to three days after the event that they saw no scratches on his face, which do not satisfactorily meet the requisites of newly discovered evidence, do not render the denial of a new trial on that ground an abuse of discretion. (Id.)
78. **SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—TESTIMONY OF PROSECUTRIX—ALIBI.**—Where the testimony of the prosecutrix, if believed, is sufficient to support the verdict, they may convict on her evidence alone; and the truth or falsity of the evidence being a matter exclusively for the jury, a new trial cannot be granted because the testimony for the defendant tends strongly to prove an alibi, and because the jury might properly have discredited the prosecutrix. (Id.)

See Witness.

COMMUNITY PROPERTY. See Husband and Wife.

DAMAGES.

1. **COUNSEL FEES.**—Counsel fees not paid can in no case be recovered as damages; but the prevailing party in an action of replevin cannot recover counsel fees, even though paid as damages for the taking and withholding or detention of the property, or for its conversion, where no other expense than counsel fees appears to have been incurred in the pursuit of the property. (Hays v. Windsor, 230.)
2. **PURSUIT OF PROPERTY—OPINION AS TO DAMAGES—PARTICULARS NOT STATED.**—The opinion of a party that he has been damaged in a specified sum for trouble and expense and time consumed in the pursuit of the property, without the statement of particulars on which the opinion is based, is not sufficiently certain to justify damages for pursuit of the property. (Id.)
3. **NEW TRIAL—EXCESSIVE DAMAGES—SUPPORT OF VERDICT UPON APPEAL.**—An appellate court is not warranted in setting aside the verdict of a jury and granting a new trial merely on the ground of excessive damages, unless the amount of damages assessed

DAMAGES (Continued).

is so unreasonably large and extravagant as to show that the jury was actuated by passion, prejudice, or corruption. (*Mize v. Hearst*, 630.)

4. **DAMAGES FOR LIBEL.**—A verdict of two thousand six hundred and fifty dollars against a newspaper for the publication of a libel, held not excessive. (*Id.*)
5. **MEASURE OF DAMAGES—PECUNIARY LOSS—LOSS OF SOCIETY—ERRONEOUS INSTRUCTION.**—In an action by a mother for the death of her son, the measure of damages is the pecuniary loss to the mother; and though the jury may be allowed to consider the loss suffered in being deprived of the comfort, society, and protection of the son, they can only be considered for the purpose of fixing the pecuniary loss. It is reversible error to instruct the jury that, in addition to the pecuniary loss, damages may be awarded in compensation for the loss of society. (*Wales v. Pacific Electric Motor Co.*, 521.)

See Contract, 7; Eminent Domain, 5, 9; Justice's Court; Municipal Corporations, 1, 2; Railroads, 1, 5-7; Water and Water Rights, 4, 5.

DEATH. See Appeal, 6, 9.

DEBTOR AND CREDITOR.

1. **ARREST OF DEBTOR—INSUFFICIENT AFFIDAVIT—JURISDICTION—VOID ORDER AND WARRANT—CASE AFFIRMED.**—The jurisdiction of the court to order the arrest of a debtor, and to issue a warrant therefor, depends upon the legal sufficiency of the affidavit for the arrest, and not upon the opinion of the judge as to its legal sufficiency. If it is radically insufficient under the statute, in not complying with its provisions, the court cannot assume jurisdiction; but in such case the order of arrest is void, and the warrant is no authority for the arrest or detention of the defendant. *Ex parte Fkumoto*, 120 Cal. 316, affirmed. (*Fkumoto v. Marsh*, 66.)
2. **FALSE IMPRISONMENT.**—An action for false imprisonment will lie against a defendant who in a civil action caused the arrest of the plaintiff as his alleged debtor, upon an affidavit so radically defective as not to bring the case within the provisions of the statutes providing for the arrest. (*Id.*)

See Banks; Insolvency.

DEED.

1. **DEED FROM FATHER TO SON—DEPOSIT WITH NOTARY—DELIVERY—PRECEDENCE OF TRUST DEED.**—A deed from a father to his son, signed, acknowledged, and left with the notary under an agreement between the parties that it was not to be recorded, and was to be delivered to the son only in case of the death of the father, is not operative from its date nor prior to its actual delivery

DEED (Continued).

- to the son; and a deed of trust given by the father for money borrowed, which was executed and recorded prior to the final delivery and record of the deed to the son, takes precedence thereof. (*Huntley v. San Francisco Sav. Union*, 46.)
2. **PERMISSIVE POSSESSION OF SON—VERBAL CONTRACT FOR GIFT—ADVERSE POSSESSION NOT SHOWN.**—Where it appeared that the son was permitted to take possession of the land under a verbal understanding with the father that if he could make a living thereon he would give it to him, his possession is not under claim of title adverse to that of the father, in the absence of a showing that he ever asserted or claimed adversely to the father. (*Id.*)
 3. **POSSESSION AS NOTICE OF RIGHTS OF SON.**—The possession of the son at the time of the execution of the deed of trust could not operate as notice of any other rights of the son than those established at the trial and found by the court upon sufficient evidence, viz., that he took possession by permission of his father that the father held the legal title to the land, and that the son would not become the owner until delivery of the deed as agreed upon. (*Id.*)
 4. **EQUITABLE RIGHT OF SON—INSUFFICIENT PROOF—MERGER IN DEED AND AGREED CONDITIONS.**—Where no consideration was paid for the right of entry upon the land by the son, and it does not appear that any improvements were made by him which were not compensated by the rents, issues, and profits, an equitable right was not shown in his favor as against the father; but any possible equitable right which he may have had to enforce a conveyance ceased upon the execution of the deed by the father under the agreement then made, and the rights of the son were thereafter measured by the terms of that transaction and the conditions then agreed upon on which the deed was to be delivered to him. (*Id.*)
 5. **CONDITION SUBSEQUENT—USE FOR RAILROAD PURPOSES—IRREGULAR USE—BREACH NOT SHOWN.**—A condition subsequent in a deed to a railway company that if the land conveyed is not used for railroad purposes only, it is to revert to the grantors, without limiting or defining the extent of the use, or the character or frequency of trains to be operated over it, is not broken by an irregular use of the land for railroad purposes, ranging from daily use to use at intervals of several months. (*Behlow v Southern Pacific R. R. Co.*, 16.)
 6. **STRICT CONSTRUCTION OF CONDITIONS SUBSEQUENT—FORFEITURE NOT FAVORED.**—Conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication, and are to be construed strictly against a forfeiture, which is not favored in law. Conditions providing for a forfeiture are to be construed liberally in favor of the holder of the estate, and strictly against an enforcement of the forfeiture. (*Id.*)

DEED (Continued).

7. **AGREEMENT FOR STATIONS—CONSIDERATION OF GRANT—PERSONAL COVENANT.**—A provision in the deed by which the railway company agrees, as a further consideration of the grant, to place two stations at a location to be selected by the grantor, at which all trains must stop, is not a condition upon which the estate is granted, and is not available to defeat the estate created by the grant, but is merely a personal covenant on the part of the grantee. (Id.)
8. **STATUTE CONCERNING OPERATION OF RAILROADS—REVERTER TO PLAINTIFF—INSUFFICIENT SHOWING.**—The plaintiff in an action to quiet title, who depends for recovery upon showing that land granted by the plaintiff's grantor for railroad purposes has reverted to the plaintiff as successor of the original owner, cannot invoke the statute of April 15, 1880 (Stats. 1880, p. 43), to establish such reverter, if no facts are alleged or shown to bring the case within that statute, or to establish that there has been a failure to operate trains upon the road for the period of six months as required by that act. (Id.)
9. **MEXICAN GRANT TO HUSBANDS—CONVEYANCE AND PATENT TO WIVES—SEPARATE PROPERTY—POWER OF HUSBANDS.**—Where a Mexican grant of a rancho to two husbands was conveyed by them to their wives, in whose names the grant was confirmed and patented, the land so conveyed, confirmed, and patented is the separate property of the wives, which the husbands, as such, had no power to alienate. (Butler v. Gosling, 422.)
10. **DEED OF PATENTED LAND BY HUSBANDS AND WIVES—EXCEPTION—EFFECT UPON TITLE.**—An exception in a deed of the patented rancho executed jointly by the husbands and their wives does not inure to the husbands and wives jointly, nor create a title in the husbands which they did not possess immediately before the deed was executed. It leaves the title to the excepted land in the wives, as their separate property, as fully as if no deed had been executed. (Id.)
11. **RESERVATION OF TRACT TO BE SELECTED AND LOCATED—EXCEPTION—PROOF IN EJECTMENT.**—A deed of the patented rancho by the husbands and wives, "reserving and saving from the effect and operation of this conveyance four square miles in two separate parts, to be selected and located by the parties of the first part," has the effect of an exception of the land reserved. But the exception does not show a title upon which an action of ejectment can be maintained, without proof that the excepted land has been selected and located. (Id.)
12. **POWER OF ATTORNEY FROM HUSBAND—SALE AND CONVEYANCE—SELECTION AND LOCATION NOT INCLUDED—TITLE NOT SHOWN.**—A power of attorney from one of the husbands subsequent to such deed to sell and convey any portion of the rancho does not include power to select and locate the excepted tract of four square miles, nor can a deed by the attorney in fact of such

DEED (Continued).

husband of a larger tract operate either as a selection of such excepted tract or to prove any title to the land conveyed. (Id.)

13. **EXCEPTIONS IN DEED FROM GRANTEES—RECITAL OF RESERVATION BY HUSBANDS—TITLE NOT CONFERRED UPON STRANGERS.**—An exception made by the grantees of the husbands and wives, in a subsequent conveyance, limited by its terms to land "heretofore disposed of and reserved" by the husbands named, cannot operate to confer title upon the husbands or upon any strangers to the instrument. (Id.)
14. **ADMISSION OR ESTOPPEL BY RECITAL—FAILURE OF PROOF.**—Though such recital in the deed might, under certain circumstances, operate as an admission or estoppel in favor of the husbands named or their grantees, it cannot have that effect, where there is a failure to prove that the husbands named, or either of them, had disposed of or reserved any land prior to the conveyance. (Id.)

See Compromise, 4; Mortgage, 24, 25; Statute of Limitations, 3; Trust, 9, 12; Way, 6.

DIVORCE.

1. **ALIMONY—MONEY JUDGMENT—EXECUTION.**—A final decree of divorce granted to the wife containing judgment in her favor for permanent alimony in a single sum of money can only be regarded as an ordinary money judgment, to be enforced by writ of execution against the property of the husband. (White v. White, 597.)
2. **CONCLUSIVENESS OF FINAL JUDGMENT—POWER NOT RESERVED.**—A final judgment in an action for divorce, in which no power is reserved to render any further relief, is conclusive of the rights of the parties, as to the relief granted, as well as to the relief withheld. The court, in such case is without jurisdiction to render any other or further judgment or relief in the action. (Id.)
3. **JUDGMENT DISSOLVING MARRIAGE—SUBSEQUENT ORDER FOR ALIMONY.**—Where a final decree is entered in an action of divorce dissolving the marriage, in which no mention is made of counsel fees or alimony, the trial court is without jurisdiction to subsequently made an order granting alimony or counsel fees. (O'Brien v. O'Brien, 409.)
4. **EXTREME CRUELTY—EVIDENCE—APPEAL.**—In an action for a divorce brought by the husband, on the ground that certain alleged conduct of his wife, with respect to her intimate association with another man, had caused him grievous, mental anguish, the question whether her conduct had such effect is one of fact for the trial court; and on an appeal from a judgment in his favor taken without any bill of exceptions, and without any findings, the supreme court must presume that there was evidence sufficient to support the allegations of the complaint. (Curl v. Curl, 638.)

DURESS.

1. ACTION FOR MONEY OBTAINED UNDER MENACE—THREATS OF CRIMINAL PROSECUTION—PLEADING—SUFFICIENCY OF COMPLAINT.—A complaint setting forth the extortion by defendant from plaintiff of merchandise and secured notes of the total value of four hundred dollars, through fear of threats of a criminal prosecution against the husband of the plaintiff for receiving stolen goods of that value, if not paid, and that the notes were paid by plaintiff under fear of the same threats, and that her said husband was not guilty of said offense, states a cause of action for the recovery of that amount so obtained by means of menace. (Woodham v. Allen, 194.)
2. CAUSE OF ACTION IN TORT—AVERMENT OF NONPAYMENT NOT REQUIRED.—Such complaint states a cause of action in tort, and not *ex contractu*; and no averment of nonpayment of the amount so unlawfully extorted by menace is required. (Id.)
3. COMPOUNDING OF FELONY—STIFLING OF PROSECUTION AGAINST INNOCENT PERSONS—PARI DELICTO.—The complaint stating that the husband was innocent of the crime charged does not show that any felony was compounded, nor that plaintiff and defendant were parties *in pari delicto* to an illegal contract. The stifling of a criminal prosecution against an innocent man, by the payment of money, cannot be wrong in an equal degree to the threatened prosecution itself. (Id.)
4. EXECUTED ILLEGAL CONTRACT—RELIEF OF PARTIES—EQUAL FAULT—FRAUD OR OPPRESSION.—The doctrine that neither of the parties of an executed illegal contract will be relieved in a court of justice applies only where the parties were equally in fault, and each had freely joined in the transaction, without being induced thereto by the fraud or oppression of the other. Where there is oppression on one side and submission on the other, there can be no equal fault. (Id.)
5. RATIFICATION OF NOTES BY PAYMENT NOT SHOWN—RECOVERY OF PAYMENTS.—The complaint averring that the notes were paid under fear of the same threats which induced their execution does not show that the payment thereof amounted to a ratification of the notes; but the payments so made under fear of arrest of the plaintiff's husband can be recovered back. (Id.)
6. CERTAINTY—TIME OF PAYMENT OF NOTES.—The complaint being sufficiently certain in showing both that the execution and the payment of the notes were secured by duress, it is not demurrable for uncertainty in not stating when the notes were made payable or when they were paid. (Id.)

EASEMENT. See Way.

EJECTMENT.

REFUSAL OF AMENDMENT TO COMPLAINT—RENT—TITLE NOT PROVED—
NONSUIT.—A plaintiff in ejectment, whose proof of title has

EJECTMENT (Continued).

failed is not injured by the refusal of the court to permit an amendment to the complaint, claiming rent of the demanded premises; and a nonsuit is properly granted for failure of the plaintiff to prove title. (Butler v. Gosling, 422.)

See Deed, 11; Harbor Commissioners, 2; Res Adjudicata, 2.

ELECTIONS.

1. MUNICIPAL CORPORATION—ELECTION FOR ISSUANCE OF BONDS—MANDATORY ORDINANCE—MISDIRECTION TO VOTERS—CLERICAL ERROR—CONTROL OF BALLOTS.—At an election for the issuance of the bonds of a municipal corporation for public improvements, the ordinance providing for the manner of voting is mandatory, and must control the voters, notwithstanding a misdirection to them caused by a clerical error in drafting the ordinance. (City of Los Angeles v. Hance, 278.)
2. VOTE UPON HIGH SCHOOL AND GENERAL PUBLIC SCHOOL BONDS—CONTRARY DIRECTION IN ORDINANCE—CARRIED VOTE DEFEATED.—Under an ordinance providing for high school bonds, “to be voted for or against as ‘general public school bonds,’” and for bonds for public school buildings other than a high school, “to be voted for or against as ‘high school bonds,’” the contrary directions in the ordinance are deemed to be followed by the voters, and where the “high school bonds” on the ballots cast are defeated, and the “general public school bonds” on the ballots are carried, no bonds can be lawfully issued for public school buildings, other than a high school. (Id.)

ELECTRICITY. See Negligence, 1-3.

EMINENT DOMAIN.

1. PUBLIC USE—JUDICIAL QUESTIONS.—The question whether the uses for which property is sought to be taken, in the exercise of eminent domain, are in fact public is a judicial question, to be determined by the court; and if it can be shown that the end sought is solely for private purposes, condemnation must be denied. (County of San Mateo v. Coburn, 631.)
2. HIGHWAY A PUBLIC USE—BURDEN OF PROOF.—A highway or public road is *prima facie* a public use, for which land may be condemned; and if it would be claimed otherwise in any particular case, or that the road is in fact for private use, the burden of showing such fact rests upon the contestant. (Id.)
3. NECESSITY—INSTRUMENTALITIES—EXTENT OF RIGHT—POLITICAL AND LEGISLATIVE QUESTIONS.—Where the use is in fact public, the necessity or expediency of taking private property therefor, the instrumentalities to be used, and the extent of the right to be delegated are political and legislative questions. (Id.)
4. DEMAND FOR AND LOCATION OF HIGHWAY—EXCLUSIVE JURISDICTION OF SUPERVISORS.—Whether a public highway is demanded

EMINENT DOMAIN (Continued).

in any particular region, as well as its location and extent, are questions referred by the legislature to the board of supervisors; and where the board, by taking proper steps under the law, has acquired jurisdiction to determine those questions, its jurisdiction is exclusive, and its determination is not subject to collateral attack or to review by the courts. (Id.)

5. **DAMAGE TO LAND NOT TAKEN—DEDUCTION FOR BENEFITS—ACTION BY COUNTY.**—In an action by a county to condemn private property for a public highway, damages to the land not taken must be allowed without any deduction for benefits to such land by the opening of the road. (Id.)
6. **COMPENSATION IRRESPECTIVE OF BENEFITS—CONSTRUCTION OF CONSTITUTION—COUNTY NOT A “MUNICIPAL CORPORATION.”**—A county is a governmental agency or a political subdivision of the state, and if it be a corporation, it is a political corporation, and is not a “municipal corporation” within the meaning of section 14 of article I of the constitution, which declares that “no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court, for the owner, irrespective of any benefit from any improvement proposed by such corporation.” (Id.)
7. **ERRONEOUS JUDGMENT—ORDER FOR POSSESSION—REVERSAL UPON APPEAL.**—Where the final judgment for damages must be reversed for error in not allowing sufficient compensation, an order for possession of the property sought to be condemned resting upon the erroneous judgment must also be reversed. (Id.)
8. **ACTION TO CONDEMN LANDS FOR HIGHWAY—EVIDENCE—PRIMA FACIE CASE—OATH OF VIEWERS—BURDEN OF PROOF.**—In an action by a county to condemn lands for a public highway, if a *prima facie* case is made by the requisite evidence in proper form, it is not incumbent upon the county in the first instance to prove that the viewers took the required oath for the faithful discharge of their duties, but the burden is upon the defendant to disprove it. (County of Sutter v. McGriff, 124.)
9. **ORDER SETTING APART DAMAGES ASSESSED—DESIGNATION OF FUND.** An order by the supervisors that the amount of damages assessed and awarded to be set apart in the treasury of the county “out of the proper fund,” to be paid in accordance with the law, is sufficient. It need not specify the particular fund from which the moneys were to be drawn. (Id.)
10. **COMPLIANCE WITH ORDER—PROOF ESSENTIAL—PRESUMPTION.**—The county must prove compliance with the order of the supervisors by the treasurer, and that the moneys awarded as damages were in fact sequestered in the treasury, and were available for compensating the owners of the land; and the absence of such proof cannot be supplied by a presumption that official duty was regularly performed. (Id.)

EMINENT DOMAIN (Continued).

11. **TENDER OF COMPENSATION—COMPLIANCE WITH LAW—FAILURE OF PROOF.**—The requisites of the tender of compensation prescribed by the law must be strictly complied with; and in the absence of proof of compliance by the treasurer with the order of the supervisors it must be held that the county failed to make its tender and to keep it good. (Id.)

EQUITY. See Claim and Delivery, 5, 6; Estates of Deceased Persons, 7; Mortgage, 15, 19; Specific Performance.

ESTATES OF DECEASED PERSONS.

1. **REVERSAL OF DECREE OF DISTRIBUTION—RESTITUTION TO EXECUTORS—ASSIGNED PART OF ESTATE.**—Upon the reversal of a decree of distribution of the estate of a deceased person, the executors are entitled to restitution of the whole estate, including any part thereof which has been assigned or transferred by the distributee. (Ashton v. Heggerty, 516.)
2. **ASSIGNED PROPERTY NOT SUBJECT TO MORTGAGE.**—In an action to obtain the restitution of property of the estate which was assigned by the distributee, it is no defense that the assigned property was not subject to an outstanding mortgage, owing to the existence of which the decree of distribution was reversed. (Id.)
3. **CONSIDERATION FOR ASSIGNMENT—PURCHASER NOT PROTECTED—PRESUMPTION.**—It is immaterial whether there was or was not a consideration for the assignment made by the distributee. The purchaser could only acquire the title of the distributee, and must be presumed to know the nature of the title purchased, as shown by the records. (Id.)
4. **PLEA IN ABATEMENT—PRIOR ACTION PENDING RESTITUTION OF STOCK—SECOND ACTION AGAINST CORPORATION AND TRANSFEREES.**—A prior action pending for the restitution of stock to the executors brought against a distributee and assignee of the shares, is not for the same cause of action, nor against the same parties, as a second action by the executors against the corporation and two transferees of the stock upon its books, who took the transfer, pending an appeal in the prior action, to cancel the certificates and to compel issuance of certificates of stock to the executors. The pendency of such prior action cannot be successfully pleaded in abatement of the second action. (Id.)
5. **CAUSE OF ACTION AGAINST CORPORATION—CANCELLATION OF CERTIFICATES WRONGFULLY ISSUED—KNOWLEDGE OF STAY BOND—NECESSARY PARTIES.**—The executors had a cause of action against the corporation to cancel the certificates of stock, where it appears that they were wrongfully issued in violation of the rights of the executors pending their appeal in the prior action, with knowledge by the corporation that they had given a stay bond upon the appeal. To such cause of action the transferees of the stock were necessary parties codefendant. (Id.)

ESTATES OF DECEASED PERSONS (Continued).

6. **CAUSE OF ACTION FOR TRANSFER OF STOCK—OWNERSHIP.**—The executors had also an independent cause of action against the corporation and the transferees of the stock owned by the estate, by reason of such ownership thereof, to compel a transfer of the stock to their names as executors. (Id.)
7. **EQUITABLE ACTION—TRIAL BY JURY.**—The action to cancel the shares of stock and to compel their transfer from the corporation to the executors, however regarded, is an equitable action, in which it is not error to refuse a demand of trial by jury. (Id.)
8. **SALE OF LAND—ACTION FOR PURCHASE PRICE.**—The personal representative of the estate of a deceased person may maintain an action against a purchaser of land belonging to the estate, and which was bought by him at a probate sale, to recover the purchase price. The remedy provided by the probate law for a resale of the property is not exclusive. (Crouse v. Peterson, 169.)
9. **DISCRETIONARY POWER OF SALE—ADMINISTRATOR WITH WILL ANNEXED.**—A power to sell lands to the testator given by a foreign will to the executor named therein, the exercise of which is discretionary with him, does not vest in an administrator with the will annexed appointed in this state as to lands there situated, so as to validate a sale of such lands made without a prior authorization of the probate court, and for a purpose not administrative. And this is so, although by the laws of the state of the domiciliary administration an administrator with the will annexed is given the same power to sell and convey real estate that the person named in the will as the executor could have had in executing the will. (Id.)
10. **EQUITABLE CONVERSION.**—In this state, the fact that the entire estate of a testator, both real and personal, is distributed as one fund does not raise any presumption of an equitable conversion of land into money. (Id.)

See Attorneys at Law, 2-5; Trust, 1; Wills.

ESTOPPEL. See Banks, 11; Deed, 14; Homestead; Mandamus, 4; Mortgage, 17; Sureties, 1.

EVIDENCE.

1. **LETTER OF DEFENDANT TO PLAINTIFF'S BROTHER.**—A letter written from the defendant to the plaintiff's brother and received by him in due course of mail, relating directly to the claim upon which the action is based, is admissible against the defendant; and the brother, in connection with its admission, may be asked if he had any personal claim against the defendant. (Ryland v. Heney, 426.)
2. **LETTER MISDIRECTED TO PLAINTIFF'S BROTHER—REFERENCE TO PLAINTIFF'S LETTER.**—A letter from defendant intended for the plaintiff and referring to a letter received by defendant from

EVIDENCE (Continued).

plaintiff which was by mistake of defendant's wife, acting as his secretary, misdirected to plaintiff's brother, is properly admitted in evidence against the defendant. (Id.)

See Agency; Appeal, 8; Banks, 8, 9, 12; Brokers, 5, 6; Contract, 6; Corporations, 2, 14-16; Criminal Law, 5, 8, 9, 11-15, 20-23, 31, 32, 37, 39, 41-46, 48-54, 57-63, 66, 68-71, 77, 78; Divorce, 4; Findings 2; Gambling Contract, 7, 8, 13, 14, 17; Husband and Wife, 4; Insurance; Mortgage, 24, 25, 27, 30; Negligence, 8, 10, 12, 13; New Trial, 1-3, 7; Partnership, 2; Railroads, 3, 4.

EXECUTION. See Claim and Delivery, 5, 6; Divorce, 1; Mortgage, 4-6, 32.

EXECUTORS AND ADMINISTRATORS. See Estates of Deceased Persons.

EXTREME CRUELTY. See Divorce, 4.

FEES. See Clerk of Court, 1, 2; Jury and Jurors, 4; Witness.

FINDINGS.

1. **SUFFICIENCY OF FINDING—REFERENCE TO COMPLAINT.**—A finding that all of the allegations of the complaint are true is a sufficient finding upon the issues raised thereupon. (County of Sutter v. McGriff, 124.)
2. **DEFENSE TO ACTION—ABSENCE OF FINDING—BURDEN OF PROOF—ABSENCE OF EVIDENCE—APPEAL.**—Where the answer pleads an affirmative defense to the action, upon which the defendants have the burden of proof, if no evidence is produced in support of it, any finding made must have been against them; and the defendants cannot complain upon appeal from the judgment of the absence of a finding upon such defense, if there is no evidence in the record to sustain it. (Woodham v. Cline, 497.)

See Appeal, 8; Arrest, 2; Attorneys at Law, 6; Claim and Delivery, 1, 2; Conversion, 1; Fraud, 4; Guardian and Ward, 2; Injunction, 3; Mortgage, 2, 10, 16; Partition, 5; Railroads, 3; Statute of Limitations, 5, 7.

FORFEITURE. See Benevolent Association, 8; Deed, 6, 7.

FORGERY. See Criminal Law, 17-25.

FRAUD.

1. **REPRESENTATION AS TO VALUE.**—The mere representation by the vendor that the property sold was worth a sum largely in excess of its actual value is not such a fraudulent misrepresentation as will warrant the annulment of the contract, if the vendee had a full and complete opportunity to inform himself as to its value,

FRAUD (Continued).

and inspected the property on several occasions before the purchase. (*Blumenthal v. Greenberg*, 384.)

2. **REPLEVIN—TENANTS' SHARE OF CROP—BILL OF SALE BY SURVIVING PARTNER—CONSIDERATION—PROTECTION AGAINST CREDITORS.**—The lessor of a farming lease to copartners for one-half of the crop, who, prior to the lease, became surety upon a note of one of the partners who died, and to whose share of the crop his widow, a daughter of the lessor, was entitled, cannot maintain an action to recover possession of the tenants' share of the crop under a bill of sale obtained by him from the surviving partner, without a transfer of possession, and without other consideration than said suretyship, by means of a misrepresentation made by him that the creditors of the firm were about to attach the property, and for the avowed purpose of protecting it against such attachment. (*Hays v. Windsor*, 230.)
3. **PARTY TO FRAUD NOT ENTITLED TO RELIEF.**—Whether the lessor and the surviving partner were parties to a fraudulent intent *in pari delicto* or not, or whether the fraud and deception were on the part of the lessor alone, he cannot avail himself of his own fraud, and cannot be aided by the court to obtain a possession not given to him under the bill of sale so procured by him. (*Id.*)
4. **ACTION FOR MONEY FRAUDULENTLY APPROPRIATED—PRAYER FOR IMPRISONMENT—GENERAL AND SPECIAL FINDINGS—MONEY JUDGMENT.**—Under a complaint alleging fraudulent appropriation of plaintiff's money received by defendant as plaintiff's agent and clerk, and praying judgment for defendant's imprisonment until it is paid, a general finding in favor of the defendant for a less sum is not inconsistent with a special finding against the alleged fraud, and a money judgment may be entered upon such findings, without judgment for imprisonment. (*Portland Cracker Co. v. Murpny*, 649.)
5. **INSTRUCTIONS CONSTRUED TOGETHER—BURDEN OF PROOF—VERDICT NOT AGAINST LAW.**—The instructions are to be construed together as a whole, and where, so construed, they import that plaintiff has the burden of proof upon the whole case, and must win or lose accordingly, but that the verdict may be against him upon the issue of fraud, if he fails to prove it, and yet may be for him upon the money demand, if money had and received by defendant to plaintiff's use is proved, a verdict against the fraud and for a money demand is not against law, though it may be seemingly inconsistent with part of the instructions taken separately. (*Id.*)
See *Brokers*, 4; *Landlord and Tenant*, 1, 2, 6; *Trust*, 14.
1. **CONTRACT TO BUY AND SELL STOCK ON MARGIN—RECOVERY OF MONEY BY UNDISCLOSED PRINCIPAL.**—An undisclosed principal

GAMBLING CONTRACTS (Continued).

may recover money paid by his agent, without disclosing the agency, upon a contract for the purchase and sale of the stocks of mining corporations on margins, in violation of section 26 of article IV of the constitution. (*Parker v. Otis*, 322.)

2. **CONSTRUCTION OF CONSTITUTION—RECOVERY BY PARTY PAYING—AGENCY.**—The constitution, in providing that "any money paid on such contracts may be recovered by the party paying it," is not to be literally construed as confining the recovery to the particular person handing over the money or as taking away the remedy of the owner of the money paid, because he employed an agent to pay the money for him. (*Id.*)
3. **EVASION OF CONSTITUTION—DUTY OF COURT.**—The constitution will not be so construed as to permit an evasion of it; but it is as much the duty of the court, in giving effect to it, to see that it is not evaded as that it is not directly violated. (*Id.*)
4. **END CONTROLLING FORM OF TRANSACTION.**—The end to the attained, and not the form of the transaction, must determine the question of the right of recovery, under the provisions of the constitution. (*Id.*)
5. **PRESUMPTION—KNOWLEDGE OF OWNER'S RIGHT OF RECOVERY—KNOWLEDGE OF OWNERSHIP.**—The defendants must be presumed to have known that they were receiving money which could be recovered by its owner; and it is immaterial to them whether they knew or did not know who was the owner of the money paid to them. (*Id.*)
6. **CAUSE OF ACTION—VALIDITY OF AGENCY.**—The cause of action of the owner of the money paid in violation of the constitution does not depend upon the validity of the agency under which it was paid, but rests upon the provisions of the constitution making the transaction void and giving the right to recover the money paid. (*Id.*)
7. **CONFLICTING EVIDENCE AS TO OWNERSHIP OF MONEY—SUPPORT OF VERDICT.**—Where there is conflicting evidence as to whether the plaintiff was the owner of the money paid, or whether plaintiff had given the money to the person paying it, the verdict of the jury based upon plaintiff's ownership will not be disturbed upon appeal. (*Id.*)
8. **CONTRACT TO BUY AND SELL "STOCKS"—INCORPORATED COMPANIES—CONSTRUCTION—EVIDENCE—MOTION FOR NONSUIT.**—A written contract to buy and sell "stocks" must be construed as referring to the stocks of incorporated companies; and under an issue taken upon an alleged contract to buy and sell mining stocks of certain mining corporations on margin, evidence that the money paid was for the purchase of "stocks," which were described in statements furnished by the defendants as "200 Kentuck," "100 Potosi," "100 Yellow Jacket," and the like, sufficiently shows that they were the

GAMBLING CONTRACTS (Continued).

shares of incorporated companies to preclude the granting of a motion for nonsuit, for failure of direct evidence of that fact. (Id.)

9. **FEDERAL CONSTITUTION NOT VIOLATED—POLICE POWER OF STATE.**—The constitutional provision of this state for the recovery of money paid for the purchase and sale of stocks on margin is a proper exercise of the police power of the state, and is not in conflict with any of the provisions of the federal constitution. (Id.)
10. **DISTINCTION BETWEEN BONA FIDE AND GAMBLING CONTRACTS—PROVINCE OF COURT.**—If our constitution fails on its face to distinguish between *bona fide* and gambling contracts, that does not render it the less a proper police regulation; for the question to be determined by the court in each case is whether the constitution is violated, and the court will always see that legitimate business transactions are not brought under its ban. (Id.)
11. **PROHIBITED TRANSACTION—CONTRACT WITH STOCK BROKERS—PAYMENT OF "MARGIN"—SECURITY FOR ADVANCES AND COMMISSIONS—POWER OF SALE—DELIVERY OF OTHER STOCKS.**—The payment of a mere margin of the cost price of stocks to stock brokers, as agents for the purchase of stocks, under an agreement that the brokers were to make advances for the purchaser, and hold the stocks purchased as security for their advances, commissions, and agreed interest, with power to sell the same to protect their interest, without delivery to the purchaser of any particular shares of the stock purchased, but with readiness of the brokers at any time on demand to deliver a like number of shares upon payment of all balance due, is within the prohibition of the constitution. (Id.)
12. **ADMISSION AS TO FACTS—REMARK OF COURT—QUESTION OF LAW—"MARGIN" CONTRACT—INSTRUCTIONS.**—Upon an admission by defendants that their witnesses would testify to certain facts, showing a "margin" contract, a remark of the court that "the admission tends to support plaintiff's theory of the case rather than defendants'," is but the expression of opinion on the question of law as to whether the facts, as admitted, constituted a "margin" contract, and did not invade the province of the jury nor prejudice the defendant's case; and the court properly instructed the jury that the facts of the case supported the plaintiff. (Id.)
13. **EVIDENCE—CONCLUSIONS OF WITNESSES NOT ADMISSIBLE.**—Upon a question asked of plaintiff's sister whether she owed defendants, the answer, "Yes, on a margin proposition," states a conclusion not responsive to the question, which should be stricken out on defendant's motion. To a question asked of plaintiff: "Did you delegate authority to your sister to act as your agent and to purchase or deal in stocks on the market with any broker," an objection of the defendants that it calls for the conclusion of the

GAMBLING CONTRACTS (Continued).

witness should be sustained. A witness should be confined to facts, leaving conclusions to be drawn from them to the jury or the court. (Id.)

14. **HARMLESS ERROR.**—Error in permitting the conclusions of the witnesses is not prejudicial, where the facts were fully stated by the witnesses, and the jury drew its own conclusions from the facts, under the instructions of the court. (Id.)
15. **READING TO JURY IRRELEVANT PART OF CONSTITUTION.**—The fact that the court, in reading to the jury the provisions of the constitution on the subject of contracts for the sale of stocks on margin, read also the first part of the section containing provisions relating to the irrelevant subject of lotteries and gift enterprises cannot be material or prejudicial to the defendants. (Id.)
16. **INSTRUCTIONS—REQUEST AS TO ABSENCE OF SYMPATHY—CHARGE AS TO ABSENCE OF EQUITIES.**—The refusal of a requested instruction that “plaintiff is entitled to no sympathy” from the jury is not prejudicial to the defendants, where the court charged the jury that “there are no equities between these parties, and their rights are to be determined by the strict rules of law.” (Id.)
17. **REQUEST AS TO ABSENCE OF PRESUMPTION—CHARGE AS TO PREPONDERANCE OF EVIDENCE.**—The defendants cannot complain because the court refused their request to tell the jury “that it is never to be presumed that parties deliberately enter into contract in violation of the constitution,” where the court clearly charged the jury that they must find for the defendants unless they find from the preponderance of the evidence that the transactions in question were margin transactions within the meaning of the constitution, as the court had declared that meaning. (Id.)
18. **INTEREST.**—A plaintiff recovering money paid on a contract for sales of stock on margin is not entitled to an allowance of interest from the commencement of the action. (Id.)
19. **STATUTE OF LIMITATIONS—“PENALTY”—MONEY HAD AND RECEIVED—DEMAND AND REFUSAL.**—An action to recover the money paid in violation of the constitution is not barred within one year, as being an action to recover a “penalty” within the meaning of section 340 of the Code of Civil Procedure; but the action is for money had and received, in which recovery cannot be had except after demand and refusal. (Id.)
20. **CONSTITUTIONAL PROVISION REMEDIAL—ACTION GIVEN NOT PENAL—DAMAGE MEASURED BY MONEY PAID.**—The provision of the constitution relative to unlawful contracts for the sale of stocks on margin and for the recovery of money paid thereon is not penal, but remedial; and the action which it gives is not a penal action merely because the contract is unlawful. The recovery therein cannot be said to be without reference to the actual damage sustained, the damage being measured by the money paid. (Id.)

GIFT. See Deed, 2-4.

GRANT. See Deed.

GUARDIAN AND WARD.

1. **RIGHT OF PARENT TO GUARDIANSHIP.**—Under section 246 of the Civil Code, and sections 1747 and 1751 of the Code of Civil Procedure, the superior court has not unlimited discretion to appoint for a minor a guardian other than the father or mother if, in its opinion, the interests of the minor would be thereby subserved. Under such latter section, and under the general law, the *prima facie* presumption is that the parent is competent, and the court is not authorized to appoint another as guardian unless it finds to the contrary. (Estate of Campbell, 380.)
2. **FINDING OF INCOMPETENCY OF PARENT.**—Upon a contest between the father and a maternal grandparent for the guardianship of a minor, an order appointing the grandparent as a guardian is not sustained by the findings, unless the court finds that the father is incompetent. A mere finding that the appointment of the grandparent is for the best interests of the minor, in respect to its temporal, mental, and moral welfare, is insufficient. (Id.)
See Compromise, 5.

HARBOR COMMISSIONERS.

1. **BOARD OF STATE HARBOR COMMISSIONERS—JURISDICTION OVER CHANNEL STREET—EBB AND FLOW OF TIDE WATER.**—The act of March 15, 1878, which specially extends the jurisdiction of the board of state harbor commissioners in and over Channel street, "as far as the ebb and flow of tide water," is not to be construed as confining their jurisdiction to that portion only of Channel street where the tide ebbs and flows, but as extending it as far as the tide ebbs and flows and to all parts of Channel street. (People ex rel. Board of State Harbor Commrs. v. Pacific Imp. Co., 442.)
2. **ACTION OF EJECTMENT—PLEADING—ADMISSION.**—The commissioners are authorized by section 2523 of the Political Code, taken together with section 2524 of the same code and the act of 1878, to bring an action of ejectment in the name of the people, to recover possession of a strip of land in Channel street over which the tide ebbs and flows; and where the verified complaint alleges that the tide ebbs and flows over the premises in controversy, and the allegation is not denied, it cannot be claimed by the defendant that the land is separated from the canal by a bulkhead, and that the tide does not ebb and flow over it. (Id.)
3. **ACT OF 1878 NOT REPEALED BY IMPLICATION.**—The act of 1878, providing that "the inshore limit of the jurisdiction of the board of state harbor commissioners shall be and remain the same as defined in section 2524 of the Political Code," and specially ex-

HARBOR COMMISSIONERS (Continued).

tending their jurisdiction in and over Channel street "as far as the ebb and flow of tide water," is not repealed by implication as to the latter provision by the subsequent amendments of 1887 and 1889 to section 2524 of the Political Code, there being no radical inconsistency between these amendments and that special provision of the act of 1878 which can still stand and be read as a part of that section as amended, and as a proviso thereto. (Id.)

HIGHWAYS. See Streets, Roads, and Highways.

HOMESTEAD.

MORTGAGE BY WIFE TO HUSBAND—ESTOPPEL.—Under sections 1242 and 1243 of the Civil Code, community property on which a homestead has been declared cannot be mortgaged by the wife to her husband, to secure an indebtedness from her to him, by a mortgage in which she alone joins. Such a mortgage is void, even in the hand of an assignee, and the wife is not estopped to deny its invalidity. (Freiermuth v. Steigleman, 392.)

See Trust, 14.

HUSBAND AND WIFE.

1. **INJURIES TO WIFE—LOSS OF SERVICES—RIGHT OF ACTION BY HUSBAND.**—A husband is entitled to recover for the damage sustained by him by reason of physical injuries inflicted on his wife through the negligence of the defendant, whereby he has been deprived of her services, and compelled to expend money as a consequence of such deprivation. (Martin v. Southern Pacific Co., 285.)
2. **COMMUNITY PROPERTY—EARNINGS OF WIFE.**—The services of the wife are a part of the earning power of the community, and the earnings received for her services constitute community property, as much as do the earnings received for the services of the husband; and for any wrongful act of another by which either husband or wife is deprived of the capacity to accumulate community property, the husband, as the head of the community, may maintain an action for damages. (Id.)
3. **EXPENSES INCURRED BY HUSBAND.**—In such an action, the husband may recover the expenses incurred by him for necessary labor and services substituted for the ordinary services of the wife. (Id.)
4. **NATURE OF INJURY—EXPERT EVIDENCE.**—The character of the injuries sustained by the wife, their probable duration, and the medical care required for their alleviation, are proper subjects for the opinion of experts; and a physician who had attended upon the wife may testify as to the character of the medical attendance she would require in the future. (Id.)

See Deed, 9-13; Divorce; Homestead.

INFANTS. See *Compromise*, 5; *Guardian and Ward*.

INJUNCTION.

1. **MOTION TO DISSOLVE—DISMISSAL OF SUIT—LIABILITY OF SURETIES—COUNSEL FEES.**—The voluntary dismissal of an injunction suit by the plaintiff, pending a motion to dissolve the injunction, is equivalent to a final determination that the injunction was improperly granted, as respects the liability of the sureties on the undertaking to respond in damages for counsel fees paid by the defendant to his attorney for making the motion to dissolve the injunction. (*Frahm v. Walton*, 396.)
2. **TIME OF PAYMENT OF COUNSEL FEES.**—Whether the counsel fees were paid in advance of the services, or were not paid until the action was dismissed, is immaterial. (*Id.*)
3. **ACTION ON INJUNCTION BOND—FEES PAID TO DISSOLVE INJUNCTION—FINDING AGAINST EVIDENCE.**—In the action on the injunction bond, a finding that the plaintiffs did not pay any money to their attorney to procure the dissolution of the injunction is not sustained by the evidence, where the only witness was a plaintiff, who testified directly that he agreed with the attorneys that they were to move for the dissolution of the injunction for a fee of four hundred dollars, which was paid to them before the action was brought upon the bond, and that other sums were paid for the services of the attorneys in defending the injunction suit. (*Id.*)

See *Constitutional Law*, 1; *Specific Performance*, 2.

INSOLVENCY.

1. **PETITION BY ASSIGNEE TO SELL ESTATE—TITLE OF ASSIGNEE.**—By an adjudication in insolvency the property passes from the insolvent debtor, and comes under the control of the court; and a petition for the sale of the estate of the insolvent, which alleges that the petitioner is the duly appointed, qualified, and acting assignee of the estate of the insolvent, and as such assignee has taken possession of all the estate described in the petition, schedule, and inventory of the insolvent, is not objectionable for not alleging specifically that the property of the insolvent has been assigned to the petitioner. (*In re Corralitos Co-operative Drying etc. Co.*, 570.)
2. **DESCRIPTION OF PERSONAL PROPERTY IN PETITION—REFERENCE TO SCHEDULE AND INVENTORY.**—A petition by the assignee for an order to sell the property of the insolvent need not describe the personal property in detail; but it is sufficient to refer to the schedule and inventory on file. (*Id.*)
3. **REQUIREMENT OF SALE—SHOWING OF NECESSITY.**—The insolvent law is distinct from the probate law in requiring that all of the property of the insolvent shall be sold and converted into money; and, in case of a petition for an order to sell the property of the insolvent at public sale, as distinguished from a private sale,

INSOLVENCY (Continued).

no necessity need be shown to justify an order of sale thereof. (Id.)

4. PUBLIC SALES—DIRECTIONS BY COURT—SALE EN MASSE—NOTICE.—

The only requirement of the insolvent law in reference to public sales of the estate of the insolvent is that such sales shall be made "as ordered by the court"; and the court has power to direct that the property shall be sold together and not separately, and to direct in what paper and for what period notice of the sale shall be published. (Id.)

5. JURISDICTION OF JUDGE PRESIDING IN ANOTHER COUNTY—PRESUMPTION.—

A judge of the superior court of one county presiding in another county, upon proper request, has jurisdiction to make an order for the sale of the property of an insolvent debtor, in such other county; and in the absence of a showing to the contrary, it must be presumed that he was requested to preside, either by the judge of the superior court of such county or by the governor in accordance with section 8 of article VI of the constitution. (Id.)

6. ASSIGNEE'S SALE—PURCHASE OF FIRM ASSETS BY INSOLVENT PARTNER—ENFORCEMENT OF CLAIM AGAINST COPARTNER.—

A member of a firm, after an adjudication in insolvency of the firm and its members, and the surrender of the firm and individual assets, may enter into any legitimate business, and may make a lawful purchase for cash, not shown to be any part of the insolvent effects, of the books of account in favor of the firm, sold at public action by the assignee, and may thereafter enforce a claim in favor of the firm against the estate of the insolvent copartner, and may, as a creditor thereof, claim and receive a *pro rata* share out of his individual estate. (In re Levy, 282.)

7. FRUITS OF PURCHASE—RESTITUTION OF PURCHASE MONEY.—

It would be highly inequitable to deprive the member of the insolvent firm who made the purchase of the books of account at public auction of the fruits of his purchase, without restoring to him the amount of the purchase money paid therefor. (Id.)

See Banks; Mortgage, 21, 23.

INSANITY. See Criminal Law, 13-15; Wills.

INSTRUCTIONS.

EXCEPTION TO PARTS OF CHARGE.—An exception embodying certain portions of the charge of the court, and stating that "the action of the court in giving said portions of said charge was contrary to law," is sufficiently specific to raise a question of law presented by a particular portion of the charge so excepted to. (Wales v. Pacific Electric Motor Co., 521.)

INSTRUCTIONS (Continued).

See Contract, 1; Criminal Law, 7, 9, 21, 29, 33, 34, 36, 46, 47, 54, 60-63, 73-76; Damages, 5; Fraud, 5; Gambling Contract, 12, 15-17; Interest, Landlord and Tenant, 2, 4-6; Negligence, 9; Sureties, 9, 12; Wills, 4-7.

INSURANCE.

1. **ACCIDENT INSURANCE—DEATH THROUGH EXTERNAL AGENCY—EVIDENCE.**—In an action upon a policy of accident insurance, conditioned upon the death of the insured happening from "bodily injuries sustained through external, violent, and accidental means," a verdict in favor of the plaintiff will not be disturbed on appeal on the ground that it is not supported by the evidence, if the evidence is conflicting as to whether the death resulted from a disease of the heart, or as to the result of a blow on the head of the insured, occasioned by the capsizing of a rowboat in which he was riding within an hour of his death. (*Stout v. Pacific Mut. Life Ins. Co.*, 471.)
2. **WEIGHT OF EVIDENCE.**—The conflicting testimony as to the immediate cause of the death, including the inherent improbability of the truth of a witness who testified to the reception of the blow, is a matter for the jury to weigh and determine. (*Id.*)
3. **CHARACTERISTICS OF BLOW CAUSING DEATH.**—A witness present at the time of the infliction of the blow on the insured may be asked to describe its apparent characteristics and as to whether it was a light or a heavy blow. (*Id.*)
See *Costa*, 2.

INTEREST.

1. **INSTRUCTION AS TO ALLOWANCE OF INTEREST—CONSTRUCTION OF VERDICT—CLERICAL ERROR—JUDGMENT.**—Where the court instructed the jury that if they should find for the plaintiff they should add interest from the time the amount found became due to the date of the verdict, a verdict allowing interest on the amount found due, "at .07 per cent per annum," from a specified date until the date of the verdict, is to be construed as an intended compliance with the instructions of the court. The expression ".07" is to be regarded as clearly a clerical error; and judgment was properly entered for the amount found due, with interest at seven per cent per annum. (*Lake Shore Cattle Co. v. Modoc Land etc. Co.*, 669.)
2. **ACTION FOR GRAPES SOLD AND DELIVERED—WRITTEN CONTRACT—TIME OF PAYMENT—ALLOWANCE OF INTEREST.**—In an action for grapes sold and delivered, where the price of the grapes is fixed by a written contract, pleaded in the answer, and the amount of recovery is capable of being made certain by calculation, the plaintiff, in a judgment based upon the contract, is entitled to recover interest from the time fixed in the contract for payment;

INTEREST (Continued).

and it is proper to look to the contract to determine the allowance of interest. (Ryland v. Heney, 426.)

See Gambling Contracts, 18.

INTERVENTION. See Pleading, 13.

IRRIGATION DISTRICT.

1. **IRRIGATION ACT—TAX DEED—VALIDITY OF ASSESSMENT—MISNOMER.**—Under section 32 of the irrigation act of 1887, providing that “when land is sold for assessments correctly imposed, as the property of a particular person, no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof affects the sale or renders it void or voidable,” an assessment made by an irrigation district to the “Escondido Seminary,” instead of to the “regents of the Escondido Seminary,” is not invalid, and cannot vitiate a tax deed made thereunder. (Escondido High School Dist. v. Escondido Seminary of University of Southern California, 128.)
2. **CONSTITUTIONAL LAW—SPECIAL LEGISLATION.**—Section 32 of the irrigation act is not unconstitutional, as being special legislation, but is a general law, applying equally to all persons embraced in a class founded upon a proper distinction. (Id.)
3. **TAX DEED AS EVIDENCE—CONSTITUTIONAL QUESTION—CONSTRUCTION OF STATUTE.**—The question as to the constitutionality of subdivision 7 of section 30 of the irrigation act of 1887, making the tax deed conclusive evidence of the regularity of all the proceedings from the assessment to the deed, is independent of the prior provisions of the section making the deed *prima facie* evidence of seen specially enumerated facts, corresponding to those enumerated in section 3786 of the Political Code; though it seems that the subdivision may be reasonably construed as referring to proceedings other than those as to which the deed is made *prima facie* evidence, so as to relieve it from constitutional objection. (Id.)
4. **ASSESSMENT TO PAY ANNUAL INTEREST—DISCRETION OF DIRECTORS.** Section 22 of the irrigation act, providing that “the board of directors shall levy an assessment sufficient to raise the annual interest on the outstanding bonds,” does not confine their power of assessment to the exact amount of the interest, but allows them a reasonable discretion in the matter. (Id.)
5. **PROLONGED EFFORT IN COLLECTION—SLIGHT EXCESS—VALIDITY OF TAX DEED.**—The collection, after prolonged effort for four years, of a sum a few hundred dollars in excess of fifteen thousand dollars required to be raised by an assessment to pay the annual interest, does not show an abuse of discretion of the directors in levying the assessment, and cannot render invalid a tax deed based upon the assessment. (Id.)

IRRIGATION DISTRICT (Continued).

6. **RECITAL IN DEED OF CERTIFICATE OF SALE—APPEAL—DEFECTIVE RECORD—PRESUMPTION.**—If the tax deed is not printed in the record upon appeal, it must be presumed in favor of the judgment that the deed correctly recited the certificate of sale as required under the act of 1887; and a claim that the tax deed offered in evidence is void for failure to make such recital cannot be sustained. The appellants must affirmatively make error to appear. (Id.)

See Mandamus, 1, 2.

JUDGE. See Contempt; Insolvency, 5.

JUDGMENT.

JUDGMENT PARTLY SATISFIED—EFFECT OF AFFIRMANCE.—The affirmance of a judgment will not affect the fact that it has been partly satisfied. (Ryland v. Heney, 426.)

See Appeal, 1, 4, 6, 8, 9, 13; Banks, 4; Claim and Delivery, 5; Compromise, 3; Contract, 3-5; Divorce, 1-3; Eminent Domain, 7; Fraud, 4; Interest; Jurisdiction; Mandamus, 4; Mortgage, 1-4, 9, 12, 13, 19, 20; Partition, 3; Pleading, 5-8, 11; Receiver; Res Adjudicata; Statute of Limitations, 7, 8; Way, 1, 8.

JUDICIAL NOTICE. See Place of Trial, 4.

JURISDICTION.

1. **CORPORATION—JUDGMENT IN ANOTHER STATE—JURISDICTION OF PERSON—CESSATION OF AGENCY.**—Service of summons in an action commenced in another state against a corporation of this state by delivery of process therein to a former agent of the corporation, which had ceased to do business in that state, and had no agency or agent therein at the time of such service, could not give jurisdiction of the person of the corporation to a court of that state; and a judgment based upon such service cannot create a right of action against the corporation in the courts of this state. (Eureka Mercantile Co. v. California Ins. Co., 153.)
2. **PROOF OF AGENCY—RECITAL IN JUDGMENT—ACTION UPON JUDGMENT—DISPROOF.**—The recital in the judgment that "proof was made in open court that the person on whom service was made was agent of the defendant at the time of the service of the summons and complaint on him," is not conclusive of the jurisdiction of the person of the corporation, and does not preclude the corporation, in an action upon the judgment, from showing that such person was not such agent. (Id.)
3. **STIPULATION OF PARTIES—DEFEAT OF PRESUMPTION.**—The stipulation of the parties in the action upon the judgment that the person served was not an agent of the defendant at the time

JURISDICTION (Continued).

of the service, defeats any presumption arising from the recital of proof in the judgment. (Id.)

4. **RECITAL NOT RES ADJUDICATA.**—The recital in the judgment rendered in the absence of the defendant is not *res adjudicata*, and cannot estop the defendant. No issue as to the agency for the defendant of the person served was presented to the court for determination. (Id.)
5. **REFUSAL TO SET ASIDE JUDGMENT—CONCLUSIVENESS NOT SHOWN.**—The mere refusal of the court of the other state to set aside the judgment, on motion of the defendant at some subsequent date, not appearing, and upon grounds not shown, and which does not show that it had obtained jurisdiction of the defendant, and which refusal is no part of the judgment record, cannot be held to conclude the defendant. (Id.)

See Appeal, 5; Benevolent Association, 4, 5, 7; Debtor and Creditor, 1; Divorce, 2; Harbor Commissioners, 1; Insolvency, 5; Justice's Court; Place of Trial, 3; Receiver, 2.

JURY AND JURORS.

1. **CHALLENGE TO PANEL—BIAS OF SHERIFF—APPEAL.**—Upon a challenge to the panel of trial jurors on the ground that the sheriff who summoned them was biased, the condition of mind of that officer is a question of fact for the trial court, and the denial of the challenge will not be reviewed on appeal when the evidence as to his mental condition is conflicting. (People v. Hartman, 487.)
2. **TRIAL BY JURY—CHALLENGES FOR CAUSE—CONSTRUCTION OF CODE—CONSANGUINITY OR AFFINITY TO "PARTY"—BENEFICIAL INTEREST.**—Subdivision 2 of section 602 of the Code of Civil Procedure relating to trial by jury, which makes "consanguinity or affinity within the fourth degree to any party" a ground of challenge of a juror for cause, is to be liberally construed. It is not intended thereby to require that the "party" shall be in name a party to the litigation, but the provision is meant to cover the case of relationship to any party shown to be directly and beneficially interested in the result of the litigation, by any participation in the recovery. (County of Mono v. Flanigan, 105.)
3. **CHALLENGE OF JUROR FOR ACTUAL BIAS—DISALLOWANCE—DISCRETION—REVIEW UPON APPEAL.**—It is only where the evidence adduced upon the challenge of a juror for actual bias is such as plainly and clearly to show the bias of the juror, and the case is one in which the law manifestly leaves nothing to the conscience or discretion of the court, that the action of the court in disallowing it is reviewable upon appeal; and where such state of facts is not established, the ruling of the trial court will not be disturbed. (Id.)

JURY AND JURORS (Continued).

4. JURY TRIAL—PARTITION—FAILURE TO DEPOSIT JURY FEES—WAIVER.

A defendant in an action of partition, which had been on the trial calendar for several weeks prior to the time at which it was actually tried, marked as a court case as distinguished from a jury case, in accordance with the custom of the court, and which at the time it was first called for trial had been answered as "ready," without any request for a jury, is not entitled to a jury merely because he demands it at the time of the trial, in the absence of an offer by him to deposit the jury fees, as required by a rule of the court. (Naphtaly v. Rovegno, 639.)

See Estates of Deceased Persons, 7; License, 2.

JUSTICE'S COURT.

1. UNLAWFUL DETAINER—TREBLED DAMAGES—JURISDICTION OF JUSTICE'S COURT.—

A justice's court has no jurisdiction of an action for unlawful detainer, though the rent is only ten dollars per month, where the whole amount of rent alleged to be due and unpaid aggregates one hundred and twenty dollars, and the complainant seeks that the same be trebled as damages for the unlawful detention. (Hoban v. Ryan, 96.)

2. TEST OF JURISDICTION—AMOUNT SUED FOR.—The test of the jurisdiction of the justices' courts, whether exclusive or concurrent, is the same as that of the superior courts, viz., "the amount sued for, exclusive of interest." (Id.)

3. "AMOUNT OF DAMAGES CLAIMED."—The provision of the constitution limiting the jurisdiction of the justices' courts in actions for forcible entry and detainer to cases where the "whole amount of damages claimed exceeds two hundred dollars," is intended to exclude such jurisdiction where the whole amount of the trebled damages claimed for the unlawful detention exceeds two hundred dollars. (Id.)

LACHES. See Practice, 2.

LANDLORD AND TENANT.

1. LEASE—TERMINATION UPON SALE—CONSTRUCTION OF COVENANT—

GOOD FAITH—FRAUD—CONSIDERATION.—A covenant in a lease for a term of five years, that in case the lessor shall sell the property at any time during the term the lessee shall yield possession, is to be construed as importing an actual sale in good faith for value, and not a fraudulent sale, without valuable consideration, to deceive the lessee, and deprive him thereby of his right of possession. (Davis v. Schweikert, 143.)

2. ACTION FOR DAMAGES—FRAUDULENT CONVEYANCE BY LESSOR—QUESTIONS FOR JURY—INSTRUCTIONS.—In an action by the lessee against the lessor and his wife to recover damages for being deprived of his term by a fraudulent conveyance from the lessor to his

LANDLORD AND TENANT (Continued).

wife, where the sale was not shown to have been made in good faith or for a valuable consideration, and admissioners were shown to have been made by the husband and wife that the deed was intended to get rid of the lessee and to deceive him into surrendering the possession, the court was justified in submitting to the jury the question of fact as to fraud, conspiracy, and consideration for the deed, under proper instructions upon those questions. (Id.)

3. **CONDITIONAL ESTATE OF LESSEE—BURDEN OF PROOF UPON LESSOR—SUPPORT OF VERDICT.**—The lessee, having received a conveyance of an estate for years upon condition, was entitled to the estate conveyed, unless the lessor could and did show that the conveyance was such a conveyance as was contemplated by the lease, and was made in good faith. Where the lessor and his wife were both witnesses in the action, and neither of them testified as to the true consideration for the deed, nor that it was made in good faith, nor as to its object or purpose, a verdict for the plaintiff, based upon evidence of their manifest intention to get rid of the plaintiff, cannot be disturbed. (Id.)
4. **INSTRUCTION AS TO EFFECT OF DEED.**—It was correct to instruct the jury that the deed might be good as between the defendants, and yet not affect the rights of the plaintiff. (Id.)
5. **INSTRUCTION AS TO PROOF OF "REPRESENTATIONS"—REFERENCE TO PLEADINGS—MODIFICATION—ACTS OF DEFENDANT.**—Where the complaint alleged fraudulent conduct and representations of the defendants, intended to deceive the plaintiff, an instruction requested by the defendant that, "in order to sustain the allegations of fraud and deceit, . . . the evidence must be clear and convincing . . . that the representations alleged to have been fraudulent and deceitful were not true," is properly modified by substituting the words "acts of the defendants" for the word "representations." (Id.)
6. **INSTRUCTION AS TO OBJECTS OF CONVEYANCES—DEPRIVATION OF POSSESSION—MODIFICATION—GOOD FAITH OF CONVEYANCE.**—An instruction requested by the defendants to the effect that the mere fact that one of the objects of the conveyance was to deprive the plaintiff of possession under the lease would not entitle plaintiff to a verdict, was properly modified by adding "if you find that said conveyance was made in good faith." If not made in good faith, and one of its objects was to deprive plaintiff of possession, the plaintiff would be entitled to a verdict in view of the evidence of the admissions made by the defendants. (Id.)

See Conversion, 3; Fraud, 2, 3.

LANDS. See Swamp and Overflowed Lands.

LARCENY. See Criminal Law, 26-34.

LEASE. See Landlord and Tenant.

LEGISLATURE. See Constitutional Law, 3.

LIBEL. See Damages, 4.

LICENSE.

1. **LICENSE TAX—BUSINESS OF RAISING AND PASTURING SHEEP—TRANSPORTATION THROUGH COUNTY.**—One who is engaged merely in transporting a herd of sheep across a county to his ranch in another county, and is not engaged in the business of raising, grazing, and pasturing sheep within the county, is not liable to a license tax upon that business. (County of Mono v. Flanigan, 105.)
2. **ACTION FOR LICENSE TAX—TRIAL—CHALLENGE OF JUROR—RELATIONSHIP TO INTERESTED OFFICER.**—Upon the trial by jury of an action to recover a license tax upon such business, a juror who is shown to be the brother of an officer employed by the county to collect such taxes, who by the terms of his employment is directly and beneficially interested in the enforcement of the license tax in question to the extent of ten per cent of the recovery, is properly challenged and excused for cause. (Id.)
3. **PLEADING—ALLEGED DATES OF BUSINESS—LIMITING OF EVIDENCE.**—Under a complaint in such action which charges the defendant with having engaged in the business of raising, grazing, and pasturing sheep within the county between the first day of June and the third day of July, the date of the filing of the complaint, the court properly limited the evidence to the acts of the defendant between those dates. (Id.)
4. **AMENDMENT OF COMPLAINT—SUBSEQUENT CAUSE OF ACTION.**—The cause of action to enforce a license tax must be limited to business conducted by the defendant before the commencement of the action. No amendment to the complaint can be permitted to charge the defendant upon a cause of action arising after the commencement of the action. (Id.)

LOAN. See Banks.

MALICE. See Arrest, 2.

MANDAMUS.

1. **ACCUSATION AGAINST DIRECTORS OF IRRIGATION DISTRICT—REFUSAL TO ISSUE CITATION.**—*Mandamus* will not lie to compel a superior court which has refused to issue a citation upon an accusation made under the provisions of section 772 of the Penal Code against a director of an irrigation district, charging him with neglect to perform his official duty as such director, "to issue said citation," and to proceed with the hearing of the same

MANDAMUS (Continued).

[Temple, J., and Beatty, C. J., dissenting.] (Kerr v. Superior Court, 183.)

2. **JUDICIAL DISCRETION—FRUITLESS RESULT—FINAL ACTION.**—*Mandamus* will not lie to control judicial discretion nor to compel a court to exercise its discretion in a particular manner, nor to control the result of its action, nor to compel it to grant rather than to refuse a motion or request, nor to compel action, the results of which would be vain and fruitless, nor to disturb the final action of a court from which there is no appeal. (Id.)
3. **MANDAMUS TO COUNTY AUDITOR—COMPLIANCE WITH MANDATE—APPEAL PRECLUDED—STAY BOND.**—Where a *mandamus* has been granted by the superior court to compel the county auditor to issue his warrant for the amount of a claim allowed by the board of supervisors, the voluntary compliance of the auditor with the mandate precludes the prosecution of any appeal therefrom, either by him or by the county on his behalf, although a stay bond upon appeal has been dispensed with upon the order of the court. (Moore v. Morrison, 80.)
4. **CLAIM AGAINST COUNTY—ESTOPPEL OF JUDGMENT AGAINST AUDITOR—COUNTY NOT ESTOPPED—MONEY PAID UPON ILLEGAL DEMAND.**—A judgment in *mandamus* to compel the county auditor to draw his warrant for the payment of a claim against the county, though it estops the auditor when made final by dismissal of an appeal therefrom, cannot estop the county which is not a party to the action. The county cannot be prejudiced by the dismissal of such appeal; nor does the act of the county auditor in complying with the mandate of the court have any other effect upon the rights of the county to recover money paid upon an illegal demand than it would have had if no legal proceedings had been commenced. (Id.)

See Reclamation District, 7; Witness, 2.

MARRIAGE. See Criminal Law, 6-9.

MEASURE OF DAMAGES. See Damages.

MECHANICS' LIENS.

1. **PREMATURE PAYMENT TO CONTRACTOR—PLEADING—AMOUNT DUE CONTRACTOR.**—In an action to foreclose the lien of a materialman an averment in the complaint that a specified sum is due from the owner to the contractor which has not been paid, omitting credit of a premature payment made by the owner to the contractor, which, under section 1184 of the Code of Civil Procedure, has no effect as a payment, as against a lienholder, states the ultimate fact, and need not set forth the reason why the amount stated is due and unpaid in order to raise an issue as to the fact of premature payment. (Ganahl v. Weir, 237.)

MECHANICS' LIENS (Continued).**2. INAPPLICABLE PROVISION—NOTICE TO OWNER TO STOP PAYMENT.—**

The provision in section 1184 of the Code of Civil Procedure which allows notice to be served upon the reputed owner to stop further payment to the contractor is inapplicable, and has no effect upon the other provision in that section that, as to liens, a premature payment to the contractor "shall be deemed as if not made, and shall be applicable to such liens, notwithstanding the contractor may thereafter abandon his contract." (Id.)

3. DEFENSE TO FORECLOSURE—LIEN CLAIMED BY SURETY—INDEMNITY TO OWNER—FULL PAYMENT TO CONTRACTOR.—

It is a sufficient defense to foreclosure of plaintiff's lien that, as surety on the contractor's bond, he agreed to indemnify the owner against all claims and demands, except the sum agreed to be paid to the contractor, regardless of the validity of the contract, and also consented that the contract might be modified without affecting his obligation, and that the contractor has in fact been fully paid by the owner. (Id.)

4. PREMATURE PAYMENTS EFFECTIVE AS TO SURETY.—

The rights of the surety are measured by the terms of his bond; and he cannot claim that premature payments made by the contractor were not effective as to him, so as to permit the enforcement of his claim of lien against the owner, who has fully paid the contractor, and who is indemnified by the bond against any other or further claim. (Id.)

5. CONSENT OF MODIFICATION—CHANGE OF TIME OF PAYMENT.—

The express consent in the bond to any modification of the contract, without affecting the obligation of the surety, includes the modification of a change in the time of payment to the contractor, and the surety has no right to complain of the time of any payment made by the owner to the contractor. (Id.)

6. BUILDING CONTRACT—PAYMENT OF BILLS—SUBSTANTIAL COMPLIANCE WITH LAW.—

A building contract providing that "all bills for materials and labor, when indorsed by the contractor, will be paid on demand, provided said bills do not exceed seventy-five per cent of the whole value of materials and labor employed in the erection of the building to the date of the bills," and that a fixed sum, "upward of twenty-five per cent of the contract price, is to be paid thirty-five days after the building is completed," does not substantially depart from the provisions found in section 1184 of the Code of Civil Procedure. (Brill v. De Turk, 241.)

7. ACTION ON CONTRACTOR'S BOND—VOLUNTARY PAYMENT OF LIENS BY OWNERS—EXCESS OF SUM DUE CONTRACTOR—SURETY NOT LIABLE.—

The owner of the building, who neglected to avail himself of a valid defense to the foreclosure of liens filed in excess of the amount due the contractor, under a valid contract, and paid a

MECHANICS' LIENS (Continued).

judgment foreclosing the same, must be deemed to have made a voluntary payment of such excess, and cannot maintain an action to recover the excess so paid against a surety on the contractor's bond, whose liability covered only claims accrued against the building, and did not extend to the releasing of the building from invalid liens. (Id.)

8. **PLEADING—CONCLUSION OF LAW—RIGHT TO LIENS—IMMATERIAL ADMISSION—FACTS SUPPORTING JUDGMENT FOR SURETY.**—An averment in the complaint in such action that the claimants whose liens were paid by the owner were entitled to their liens, is of a conclusion of law, and an admission thereof in the answer may be disregarded as immaterial. The validity of a judgment in favor of a surety cannot be affected by such averment and admission, but depends upon facts pleaded and found which supports the judgment. (Id.)

MENACE. See Duress.

MEXICAN GRANT. See Deed, 9-14.

MINES AND MINING. See Corporations, 11; Statute of Limitations, 1-4.

MISTAKE. See Brokers, 4; Mortgage, 14-17, 19, 20; Swamp and Overflowed Lands, 3.

MORTGAGE.

1. **JUDGMENT FORECLOSING MORTGAGE—MOTION TO VACATE—LAPSE OF TIME.**—A motion to vacate a judgment foreclosing a mortgage not void on its face, made more than six months after the entry of the judgment, is too late, and must be denied. (May v. Hatcher, 627.)
2. **JUDGMENT NOT VOID—ABSENCE OF SEPARATE FINDINGS.**—The absence of separate findings, or the incorporation of findings in the judgment of foreclosure, cannot render the judgment void upon its face. (Id.)
3. **PREMATURE ENTRY OF DEFAULT—AMENDMENT NOT SERVED—ERROR—VALIDITY OF JUDGMENT.**—The premature entry of default against defendants in the foreclosure suit who made default and did not ask to have their default set aside, and the failure to serve them with a copy of an amended complaint, renders the judgment against them merely erroneous and subject to reversal upon appeal, but in the absence of an appeal does not render the judgment foreclosure of the mortgage void upon its face. (Id.)
4. **SALE UNDER FORECLOSURE OF MORTGAGE—MOTION TO VACATE—COMMISSIONER'S OATH—FILING.**—A motion to vacate a sale under a judgment not void foreclosing a mortgage, made after the judg-

MORTGAGE (Continued.)

ment had become final, cannot be entertained upon the ground that no written oath or affidavit of the commissioner who made the sale is on file in the clerk's office. The law does not require the commissioner to make a written affidavit, or to file it anywhere; and it is sufficient if the record shows that he was sworn. (Id.)

5. **PRIOR INVALID SALE—PUBLICATION OF NOTICE—AMENDED NOTICE.**—The fact that the commissioner made a prior invalid sale, which was set aside for insufficiency of notice, cannot invalidate a sale subsequently made upon due notice; and the fact that a wrong date was first published cannot affect the sale where an amended notice was sufficiently published prior to the sale. (Id.)
6. **INADEQUACY OF PRICE.**—Mere inadequacy of price is not of itself sufficient ground for vacating a sale regularly made under foreclosure of a mortgage, and a motion to vacate such sale not presenting that ground, and having meager evidence of inadequacy of price to support it, cannot be granted on that ground. (Id.)
7. **NEW TRIAL IN FORECLOSURE—MARSHALING SECURITIES—SALE OF PURCHASED LAND—ERROR AS TO POWER.**—Upon affirmance of an order granting a new trial of a foreclosure suit, a decision upon appeal that a decree in favor of the plaintiff, who, as a vendor of land, holds the title as security for the purchase money of land sold, foreclosing only a lien upon other lands held by him as collateral security for the purchase money, was erroneous as against the holder of a subsequent deed of trust of such other lands, and that the purchased land should be first sold, before the sale of the other lands, is the law of the case, which it is the duty of the court to enforce upon the new trial; and it is error to decide that the court had no power to order such sale, by reason of the finality of the former judgment as a bar thereto. (Kent v. San Francisco Sav. Union, 400.)
8. **POWER OF COURT—RELIEF CONSISTENT WITH FACTS ALLEGED—PLEADING—ORIGINAL COMPLAINT—PRAYER.**—The court had power where the original complaint was answered by the purchaser as well as by the subsequent lienholder, to grant any relief consistent with the facts alleged and embraced within the issues. It had power to order that the purchased lands be first sold as against the subsequent lienholder, under the original complaint, where it stated all the facts of the case, and set forth the contract of sale, containing a description of the property sold, as well as of the other lands, and asked not only for the foreclosure of the lien upon the other lands, but "for such other and further orders, judgments, and decrees as may be equitable." (Id.)
9. **AMENDED COMPLAINT—FORECLOSURE OF VENDOR'S SECURITY—STIPULATION AS TO ANSWER OF PURCHASER—JUDGMENT-ROLL.**—Where an amended complaint was filed, expressly seeking a foreclosure

MORTGAGE (Continued).

of the vendor's security held by reservation of the title of the property sold, and seeking a first sale thereof, a stipulation made between the attorneys for the plaintiff and the attorney for the purchaser, that the answer of the latter "now on file to plaintiff's amended complaint be his answer to said amended complaint, when amended as hereinbefore specified," and entered upon the minutes of the court, is binding, and is part of the judgment-roll, and proves an answer of the purchaser to the amended complaint. (Id.)

10. **CONSTRUCTION OF FINDING—FILING OF PURCHASER'S ANSWER.**—A finding that the purchaser "appeared and filed an answer in this action" must be presumed correct, and to refer to the amended complaint, upon which the court was acting. (Id.)
11. **STATUTE OF LIMITATIONS—NEW CAUSE OF ACTION NOT STATED.**—The amended complaint did not bring in new parties or state a new cause of action, and the cause of action in the original complaint not being barred by the statute of limitations, it cannot apply to the amended complaint. (Id.)
12. **WAIVER OF VENDOR'S LIEN—TITLE HELD AS SECURITY—LIEN UPON OTHER LANDS—JUDGMENT UPON FORECLOSURE.**—The title held by the vendor in trust for the purchaser, as security for the unpaid purchase money, was not waived by the taking of collateral security upon other lands, nor by the original judgment foreclosing the lien only upon the other lands, which was set aside by the order granting a new trial. The vendor did not, by so doing, evince a determination to waive the title held as security; nor did he put himself in such a condition that it would be inequitable upon the new trial to enforce the vendor's security, which was ordered to be first enforced in the decision upon appeal. (Id.)
13. **NEW TRIAL GRANTED UPON MOTION OF LIENHOLDER—FINALITY OF JUDGMENT AS TO PURCHASER—POWER OF COURT.**—The fact that the new trial was granted upon motion of the subsequent lienholder only, and that the purchaser did not move for a new trial, or appeal from the judgment, and that it was final as to him, cannot deprive the court of power to correct the error made in the former decree, even though such correction may incidentally affect the purchaser. (Id.)
14. **MISTAKE IN MORTGAGE, DECREE, AND SHERIFF'S DEED—REFORMATION IN EQUITY—REMEDY BY MOTION.**—Where there is a mistake in the description of property in a mortgage, and the same mistake has been carried into the decree of foreclosure and the sheriff's deed, conceding that relief might have been granted by motion in the original case, a court of equity has jurisdiction to go back to the original transaction and to reform the mortgage, as well as the decree and deed, so as to make them conform to the original intention of the parties. (Busey v. Moraga, 586.)

MORTGAGE (Continued).

15. **POWER OF EQUITY TO ORDER RESALE.**—If justice requires it, it is in the power of a court of equity, after reforming the mortgage and the decree and order of sale, to direct a new notice and sale of the property. (Id.)
16. **LOCATION OF TOWN LOTS—ERROR IN BLOCK—MUTUAL MISTAKE—FINDING AGAINST EVIDENCE.**—A finding made by the court that there was no mutual mistake of the parties, but only a mistake of the mortgagor in copying from the description in a first mortgage, which showed an erroneous location of town lots owned by the mortgagors as being in block "H," whereas the only lots owned by them were in block "K," held to be against the evidence, which showed that the mortgagors intended to mortgage the town lots owned by them, and believed that they were included in plaintiff's mortgage and decree of foreclosure, as well as in the first mortgage, which was also foreclosed in the same action, and that, so believing, the mortgagors made default and consented to the foreclosure, and did not discover the mistake in the description until after the sale under the foreclosure. (Id.)
17. **ESTOPPEL OF MORTGAGORS.**—The mortgagors are estopped by the mortgage from denying that they executed it; and where it appears that they consented to a decree of foreclosure on the understanding that both of the mortgages foreclosed included the property owned by them, they are estopped from denying that there was a mistake on their part in the description of the property, and from asserting that they gave a mortgage upon property which they did not own. (Id.)
18. **FORECLOSURE OF MORTGAGE—APPEAL BY CLAIMANT OF INTEREST IN LAND—NOTICE—FAILURE TO SERVE MORTGAGOR—DISMISSAL.**—Upon appeal by the claimants of an undivided interest in mortgaged land, alleged to be not subject to the mortgage, from a decree adjudging the mortgage a lien thereupon and foreclosing it upon the entire premises, and providing for the docketing of a judgment against the mortgagor for any deficiency, the mortgagor has an interest adverse to the appellants, which would be injuriously affected by a modification or reversal of the judgment, and must be served with the notice of appeal. Upon failure to serve him therewith, the appeal must be dismissed for want of jurisdiction to entertain it. (Bair v. Watkins, 540.)
19. **MORTGAGES TO SECURE SAME INDEBTEDNESS—FORECLOSURE—MISTAKE IN ASSIGNMENT—RELIEF IN EQUITY—SUBSEQUENT JUDGMENT CREDITOR.**—Where two successive mortgages are given to secure the same indebtedness, the latter of which includes mortgaged property in addition to that included in the first mortgage, and subsequently the indebtedness is assigned by the mortgagee, but through mistake of fact as to the existence of the second mortgage the first mortgage alone is assigned, instead of the second, and is foreclosed, the assignee is entitled, upon a discovery of the mis-

MORTGAGE (Continued).

take, and a showing that the mortgaged property included in the first mortgage is insufficient to pay the mortgage indebtedness and that the mortgagor is insolvent, to maintain a suit in equity to set aside the judgment of foreclosure, and for a foreclosure of the second mortgage, as against a judgment creditor of the mortgagor, whose judgment lien is subsequent to both mortgages, but prior to the first foreclosure, and who purchased at execution sale with full knowledge of the existence of the mortgage lien. (*Gerig v. Loveland*, 512.)

20. **REMEDY BY MOTION—ERRONEOUS JUDGMENT—UNPREJUDICIAL ERROR.** In such a case, where the mistake is discovered after the expiration of six months after the decree of foreclosure in the first action is entered, the assignee is not limited to the remedy by motion under section 473 of the Code of Civil Procedure; and a judgment of foreclosure in the second action, without formally vacating the decree in the first action, although erroneous under section 726 of the Code of Civil Procedure, is without prejudice to such judgment creditor and is not a reason for a reversal on his appeal. (*Id.*)
21. **MORTGAGE TO CORPORATION—ACKNOWLEDGMENT BEFORE INTERESTED OFFICER—OBJECTION BY ASSIGNEE OF INSOLVENT MORTGAGOR.**—The assignee in insolvency of the estate of an insolvent mortgagor merely represents his creditors, and is not a subsequent purchaser for value and in good faith, and cannot contest the validity of a prior mortgage of the insolvent to a corporation on the ground that the acknowledgment was void because taken before a notary public, who was an officer of the corporation, holding stock therein. (*Farmers' Exch. Bank v. Purdy*, 455.)
22. **OBJECT OF ACKNOWLEDGMENT—RECORD.**—The only object of an acknowledgment is that the instrument may be recorded, unless the statute makes it essential to the validity of the instrument. (*Id.*)
23. **VALIDITY OF UNACKNOWLEDGED MORTGAGE—INSOLVENCY OF MORTGAGOR.**—An unacknowledged and unrecorded mortgage is valid between the parties, and it is equally valid as against the subsequent assignee in insolvency of the mortgagor if it was not executed in violation of the provisions of the Insolvent Act. (*Id.*)
24. **ACTION TO QUIET TITLE—CONVEYANCE IN SATISFACTION OF MORTGAGE—RECITALS—BURDEN OF PROOF AS TO INTENTION.**—In an action to quiet title, where the plaintiffs relied upon a conveyance in fee simple made by the defendant to the plaintiffs, which recited that it was made in consideration of the satisfaction and cancellation of a mortgage from defendant to the plaintiffs, and an additional sum of fifty dollars, and that it was not made for the purpose of securing money due, but was executed and delivered for the purpose of conveying the land to the plaintiffs, their heirs and assigns, by a title in fee simple absolute, the burden of proof is not upon the plaintiff to show that such deed was not

MORTGAGE (Continued).

intended as a mortgage, but is upon the defendant to show by clear and convincing evidence that the deed was so intended. (Woods v. Jensen, 200.)

25. **CONFLICTING EVIDENCE AS TO INTENTION—FINDINGS OF JURY—APPEAL.**—Where there is conflicting evidence as to whether the deed was or was not intended as a mortgage, the findings of the jury that the plaintiffs were the owners of the land in fee simple, and that the defendant owned no interest therein, are warranted by the evidence, and cannot be disturbed upon appeal. (Id.)
26. **CONDITIONAL AGREEMENT TO RECONVEY—PERMISSION TO RETAIN POSSESSION.**—The mere giving to the defendant by the plaintiffs of a conditional agreement to reconvey the land on or before a certain date, upon payment of a specified sum of money, and if not paid the agreement should become void and cancel itself, together with a verbal agreement for retention of possession by the defendant until that date, does not show the transaction to be a mortgage, in the absence of sufficient proof that it was so intended. (Id.)
27. **EVIDENCE—CONVERSATION WITH DEFENDANT'S ATTORNEY—AGENCY—MAKING OF CONTRACT.**—Evidence is admissible to show a conversation between one of the plaintiffs and the attorney for the defendant, to whom the defendant, who spoke but little English, referred the plaintiff, when he was pressed for payment of the mortgage; and such evidence is not subject to the objection that plaintiff's attorney had no authority to bind the defendant by contract, where it appears that such conversation was merely preliminary, and that the transaction was not consummated until a meeting of the plaintiff and of the defendant and his attorney, who then acted as interpreter for the defendant, and that the defendant thereafter executed the deed. (Id.)
28. **TEMPORARY PLEDGE OF MORTGAGE—SUBSEQUENT SATISFACTION—TITLE NOT AFFECTED.**—The fact that the note and mortgage were temporarily pledged when the deed was executed, and were redeemed and canceled, and satisfaction of the mortgage entered upon the record, several days thereafter, does not affect the title acquired by the deed. (Id.)
29. **CANCELLATION WRITTEN UPON NOTE—SECONDARY EVIDENCE.**—Secondary evidence of the plaintiff that he wrote the words "canceled and paid" on the back of the note, is sufficiently warranted by proof that he put the note and mortgage in his pocket with those words on the note, to be delivered to the defendant or his attorney, and thought he had given them to the attorney, and could not since find them, though he had looked everywhere among his papers. The fact that he did not expressly state that he had looked in his pocket, the question not having been asked him, cannot affect the sufficiency of the foundation laid. (Id.)

MORTGAGE (Continued).

30. **IMMATERIALITY OF EVIDENCE—NOTE RENDERED VALUELESS—ABSENCE OF CONDITION.**—The proof of the cancellation of the note cannot be material in view of the cancellation of the mortgage upon the records, rendering the note of no value, and in view of the further fact that the cancellation of the note and mortgage was not a condition either precedent or subsequent to the title conveyed by the deed. (Id.)
31. **CHATTEL MORTGAGE OF SHEEP—RECORD WITHOUT VERIFICATION BY MORTGAGEE—ATTACHMENT—PURCHASE UNDER EXECUTION.**—A chattel mortgage of sheep, recorded without any verification by the mortgagee, as required by law, is void as against an attachment of the sheep by a creditor of the mortgagor, and as against a purchaser of the sheep at a sale under execution by such attaching creditor. (Alferitz v. Scott, 474.)
32. **VERIFICATION BY MORTGAGEE PRIOR TO ATTACHMENT—ABSENCE OF RECORD AND NOTICE.**—The fact that the chattel mortgage after its record was subsequently verified by the mortgagee prior to the attachment suit, without any record of the instrument so verified, can give it no additional validity, as against the attaching creditors or the purchaser under the execution sale, neither of whom had any notice of the transaction other than that given by the record. (Id.)
33. **CHATTEL MORTGAGE—WRITTEN OFFER OF PAYMENT—GOOD FAITH.**—A written offer by the mortgagor to the mortgagee before the commencement of a foreclosure suit, to pay a specified sum in full payment and discharge of a chattel mortgage, is an offer of performance, which, in order to be available, "must be made in good faith, and in such a manner as is most likely, under the circumstances, to benefit the creditor," as required by section 1493 of the Civil Code. (Horan v. Harrington, 142.)
34. **INEFFECTUAL OFFER—FORECLOSURE—RECOVERY OF COSTS AND COUNSEL FEES.**—Where no steps were taken, in connection with the written offer of payment, to extinguish the obligation, and it appeared in the action to foreclose the mortgage that the mortgagor had no money with which to make the offer good when it was made, and the court found from the evidence that the offer was not made in good faith, it must be deemed ineffectual for any purpose, and notwithstanding the recovery did not exceed the sum offered, the mortgagee was entitled to recover costs and counsel fees in the action. (Id.)
- See Appeal, 13-16; Compromise, 1; Corporations, 10, 11; Homestead.

MUNICIPAL CORPORATIONS.

1. **CONSTITUTIONAL LAW—DAMAGE TO PRIVATE PROPERTY—LIABILITY OF CITY—EXCAVATION OF STREET TO OFFICIAL GRADE.**—Under section 14 of article I of the constitution of 1879 private property

MUNICIPAL CORPORATIONS (Continued).

cannot be damaged for public use without just compensation; and a city is liable thereunder for damage caused to the owner of an abutting lot by excavating the street in front thereof, in pursuance of a contract let by the city for that purpose. (*Eachus v. City of Los Angeles*, 492.)

2. ACTION FOR DAMAGES—CONSTRUCTION OF PLEADING—DEPRIVATION OF ACCESS—DESTRUCTION OF VALUE—UNCERTAINTY—WAIVER.—In an action by the owner of a lot abutting upon a street and alley for damage caused by the city in grading, a complaint averring that the grading “rendered access to plaintiff’s said property by said street and alley impossible, and utterly destroyed the value thereof,” is to be liberally construed as imparting destruction of the value of the property, and not merely of the value of the access; and any uncertainty in the complaint was waived by failure to demur specially thereto. (*Id.*)

3. ANSWER—MOTION TO STRIKE OUT EVIDENCE—OBJECTION TO COMPLAINT AT TRIAL.—Where the city in its answer took issue upon the destruction of the value of the property, a motion to strike out all evidence tending to prove damage to the lot other than by cutting off access thereto, on the ground that the complaint did not allege any other damage, was properly denied. On the trial no objection to the complaint can be considered, unless it goes to the want of jurisdiction, or to the insufficiency of the complaint to state a cause of action. (*Id.*)

See Elections; Eminent Domain; Irrigation District; Reclamation District.

MURDER AND MANSLAUGHTER. See Criminal Law, 35-54.

NEGLIGENCE.

1. JOLTING OF ELECTRIC-CAR—DEFECTIVE CATTLE-GUARD.—In an action for damage for injury by being thrown from an electric-car, evidence tending to show that the track was not in proper repair at a cattle-guard rapidly crossed by the car, which by a lurch or jerk threw plaintiff from the car to his injury, is sufficient to enable the jury to infer negligence; and it is error for the court to take the case from the jury. (*Holloway v. Pasadena etc. Ry. Co.*, 177.)

2. CONTRIBUTORY NEGLIGENCE—CROWDED CAR—SITTING UPON PLATFORM—QUESTIONS FOR JURY.—It is not contributory negligence, as matter of law, for the plaintiff to sit upon the platform of a crowded car, with his feet upon the step, from which position he was jerked to the ground to his injury; but the question is for the jury. It is for the jury to determine whether or not the defendant, by crowding the car, caused the plaintiff to take such seat, and whether or not the seat was such as to endanger the life or safety of the plaintiff, provided the defendant exercised due care. (*Id.*)

NEGLIGENCE (Continued).

3. **ACTION FOR DEATH—ELECTRIC WIRE NOT PROPERLY INSULATED—VIOLATION OF ORDINANCE—CHANGE OF POSITION OF WIRE.**—In an action for death caused by an improperly insulated electric wire maintained in violation of a city ordinance, the right of recovery is not precluded by the mere fact that the original position of the wire may have been subsequently changed by some extrinsic cause. (*Wales v. Pacific Electric Motor Co.*, 521.)
4. **RAILROAD COMPANY—OPERATION OF OPPOSING TRAINS—GROSS NEGLIGENCE.**—A railroad company operating a single track so that two trains are running thereupon in opposite directions at the same time so as to threaten a collision, is guilty of gross negligence. (*Green v. Pacific Lumber Co.*, 435.)
5. **ESCAPE OF PASSENGER TO AVOID THREATENED COLLISION—RESULTING INJURY—CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.**—A lady passenger, who jumped with other passengers from a train going from eight to ten miles per hour, under an apprehension of great danger from collision with a freight train, discovered to be rapidly approaching from around a curve toward the passenger train, and fell face downward upon the track, from which she rolled to escape being run over, and was carried down an embankment, to her serious injury, cannot be charged with contributory negligence, as matter of law; but it is essentially a question of fact whether her acts were justified in view of all the surrounding circumstances. (*Id.*)
6. **RESPONSIBILITY OF RAILROAD COMPANY—ESCAPE OF PASSENGERS CAUSED BY PERILOUS OPERATION OF TRAINS.**—If a railroad company so operates its trains as to place its passengers in situations apparently so dangerous and hazardous as to create in their minds a reasonable apprehension of peril and injury, and thereby excite their alarm and induce them to make efforts to escape, and if, in such efforts to escape, they receive personal injuries, the railroad company is responsible in damages for its negligence. (*Id.*)
7. **ALIGHTING OF PASSENGER IN DANGEROUS SPOT.**—The fact that a passenger, in the hurry and excitement of an attempt to escape from the peril of a threatened collision of trains, alights upon an unsafe and dangerous spot, will not, of itself, necessarily defeat a right of recovery, although a safe and secure spot was at hand and equally ready of access. (*Id.*)
8. **PLEADING AND EVIDENCE—CHARGE OF BEING "THROWN UPON TRACK"—PROOF OF SINGLE ACT—EVIDENCE NOT OBJECTED TO.**—Under a count in the complaint averring that plaintiff, "in her effort to escape from said car and void probable injury and death, was thrown with great violence and force upon the track of defendant's railroad, and was greatly and severely injured," proof may be given of her jumping from the train, her falling or being thrown upon the track, and her rolling from the track down the embankment, which may be regarded as a single act whereby she

NEGLIGENCE (Continued).

was injured, filling the measure of the averment, especially where the evidence was not objected to as not being within the pleadings. (Id.)

9. **REFUSAL OF INSTRUCTION—APPLICABILITY TO ONE COUNT, AND NOT TO ANOTHER.**—Where the complaint in the first count alleged that the injury was the result of a collision of the trains, but in the second count alleged that it resulted from an escape from the car to avoid peril of death from the threatened collision, in which she was thrown upon the track with violence to her injury, the cause of action in the second count in no way depends upon an actual collision; and a requested instruction that plaintiff cannot recover unless she has proved by a preponderance of evidence that the collision caused her injury is properly refused. (Id.)
10. **INJURY RESULTING TO PASSENGER—PRIMA FACIE CASE—BURDEN OF PROOF UPON CARRIER.**—Evidence that plaintiff was a passenger in defendant's car, and was injured as the result of the operation by the defendant of colliding trains, makes a *prima facie* case against the defendant. The burden of proof is then thrown upon the defendant, as a carrier of passengers, to overcome such *prima facie* case; and if such burden is not sustained, the verdict should be for the plaintiff. (Id.)
11. **CRUDENESS OF TRAIN—RIGHTS OF PASSENGER NOT WAIVED—RESPONSIBILITY OF CARRIER.**—The plaintiff by riding as a passenger for hire in a car which, with the locomotive attached, was a crude affair, waived none of her rights as a passenger. The defendant, in transporting her as a passenger for hire, was subject to all of the rules of law which bind common carriers of passengers; and the plaintiff was entitled to the same care of the defendant for her safety as though she were a passenger upon a Pullman train. (Id.)
12. **EVIDENCE—COMPLAINTS OF PAIN AND SUFFERING TO NURSE—EXPERT—HEARSAY.**—Evidence that during the first week after the injury of the plaintiff she made complaints of pain and suffering to the nurse attending upon her is admissible. It involves no principle of expert evidence, and is not objectionable as hearsay. (Id.)
13. **DECLARATIONS INDICATIVE OF PRESENT PHYSICAL CONDITION.**—Involuntary declarations and exclamations indicative of a present physical condition are competent evidence, as distinguished from objectionable declarations, only amounting to the statement of a past condition. (Id.)

See Attorneys at Law, 2-5; Telegraph Companies; Warehouseman, 3.

NEGOTIABLE INSTRUMENTS. See Corporations, 1-7, 13; Pleadings, 9, 10.

NEW TRIAL.

1. **SPECIFICATIONS IN STATEMENT—INSUFFICIENCY OF EVIDENCE—OBJECT OF STATUTE.**—The object of the statute relating to specifications of the insufficiency of the evidence in a statement on motion for a new trial is for the benefit of the opposing party and to abbreviate the statement. The specifications are sufficient if they enable opposing counsel to determine what evidence should be put in the statement, and enable the judge to strike out redundant and useless matter. The statute is primarily for the trial court, which is better able than the appellate court to determine whether the specifications are sufficient. (*American Type Founders' Co. v. Packer*, 459.)
2. **CONSTRUCTION OF SPECIFICATIONS—PLEADING—NOTICE.**—The specifications are not to be deemed in the nature of a pleading, which is to be construed most strictly against the pleader, but in the nature of a notice which is to be regarded with liberality, and the sufficiency of which is to be tested by inquiring whether the other party is injured by defects. (*Id.*)
3. **SPECIFICATION OF PARTICULARS—ACTION OF TRIAL COURT—REVIEW UPON APPEAL.**—Where there is a reasonably successful effort to state the particulars of the insufficiency of the evidence, and the specifications are such as may have been sufficient to notify counsel and the court of the grounds relied upon, and the trial court has entertained and passed upon the motion, the appellate court ought not to refuse to consider the case on appeal, especially if the transcript shows that all the evidence has been brought up. (*Id.*)
4. **SETTLEMENT OF STATEMENT—ALLOWANCE OF AMENDMENTS—FAILURE TO GIVE NOTICE—JURISDICTION.**—The failure of the party moving for a new trial to give notice of the settlement of the statement and proposed amendments thereto, or to give express notice of his adoption or rejection of the proposed amendments, operates as an admission that the amendments are to be allowed, and cannot deprive the judge of jurisdiction to settle the statement as so amended, upon the basis of the adoption of the proposed amendments by the moving party. (*Black v. Hilliker*, 190.)
5. **ORDER GRANTING NEW TRIAL—REVIEW UPON APPEAL.**—Upon appeal from an order granting a new trial, only the matters considered by the trial court upon the motion for a new trial will be reviewed by this court. (*Marsteller v. Leavitt*, 149.)
6. **"IRREGULARITY IN PROCEEDINGS OF COURT"—AFFIDAVITS—NATURE OF GROUND.**—"Irregularity in the proceedings of the court," as a ground for new trial, must be based upon affidavits; and this ground is intended to refer only to matters which an appellant cannot fully present by exceptions taken during the progress of the trial, and which, therefore, must appear by affidavit. (*Woods v. Jensen*, 200.)

NEW TRIAL (Continued).**7. IMPROPER QUESTIONS ASKED BY COURT—EXCEPTIONS—STATEMENT.—**

Objections to questions asked of witnesses by the court, equally with objections to questions asked by counsel, can only be reviewed upon exceptions taken thereto at the trial; and improper questions asked by the court cannot be urged as a ground of "irregularity in the proceedings of the court." If exceptions are not taken the fact that questions so asked are embodied in the statement is immaterial; and the respondent is not bound to object to their being inserted therein. (Id.)

See Appeal, 10; Attorneys at Law, 3, 4; Banks, 12; Criminal Law, 31, 32, 53, 77; Damages, 3; Mortgage, 7, 13.

NUISANCE. See Way, 1, 2.

OFFICE AND OFFICERS.

1. PUBLIC OFFICER—SUPERVISOR'S SALARY—COUNTY OF ELEVENTH CLASS—COUNTY GOVERNMENT ACTS OF 1893 AND 1897.—A supervisor of a county of the eleventh class, who was elected under the County Government Act of 1893, under which his salary was fixed at the sum of eighteen hundred dollars per annum, and who was in office at the time of the enactment of the County Government Act of 1897, under which his county became one of the thirteenth class and by which the salary of supervisors was fixed at one thousand dollars per annum, continues to be entitled, under section 233 of the latter act, to the salary provided by the act of 1893; and the fact that since the passage of the latter act he had received warrants only for the amount of the salary therein provided, upon the refusal of the auditor to issue them for the amount provided by the act of 1893, does not estop him from demanding the balance. (Ellis v. Jefferds, 478.)

2. PUBLIC OFFICERS—DEPUTIES—COUNTY OF ELEVENTH CLASS—COUNTY GOVERNMENT ACTS OF 1893 AND 1897.—The deputy district attorneys, the deputy county superintendent, and the deputy county clerk of a county of the eleventh class, which officers were provided for by section 173 of the County Government Act of 1893 and their salaries fixed, and who were in office at the time of the enactment of the County Government Act of 1897, remain entitled, under section 233 of the latter act, to the payment of their salaries by the county. The latter act does not contemplate that their salaries should be paid by their respective principals. (McPhail v. Jefferds, 480.)

See Arrest; Clerk of Court; Constitutional Law, 1; Harbor Commissioners; Mandamus.

ORDINANCE. See Elections; Negligence, 3.

ORPHAN ASYLUM. See Corporations, 21.

PARENT AND CHILD. See Guardian and Ward.

PARTIES. See Benevolent Associations, 1; Compromise, 2, 3, 6; Res Adjudicata.

PARTITION.

1. PLEADING—LEGAL TITLE—TENANCY IN COMMON—RECORD OF LAND.—

A complaint in partition alleging that the plaintiff and defendant are the owners as tenants in common of the land described, and that the whole land stands of record in the name of the defendant, but that plaintiff has an estate of inheritance therein, and is the owner of the undivided one-half thereof, and of the water stock appurtenant thereto, and that the defendant has a similar interest therein, must be construed as alleging legal and not equitable ownership in the plaintiff. The averment as to the condition of the record is consistent with plaintiff's legal ownership of an undivided half of the land by an unrecorded deed. (*Spader v. McNell*, 500.)

2. EQUITABLE TITLE MUST BE PLEADED—VARIANCE—OBJECTION TO PROOF.—An equitable title in the plaintiff in an action for partition must be specifically set forth in the complaint, and all the facts constituting the equity must be fully stated. If the complaint alleges legal ownership in the plaintiff, and evidence is offered to prove an equitable ownership only, there is an entire variance, which may be taken advantage of by objection that the proof is irrelevant. (*Id.*)

3. APPEAL FROM INTERLOCUTORY JUDGMENT.—An appeal from an interlocutory judgment in an action for partition, taken more than sixty days after the entry of the interlocutory judgment is too late and must be disregarded. (*Bartlett v. Mackey*, 181.)

4. SALE—MATERIAL INJURY FROM PARTITION—PLEADING—EVIDENCE.—It is not essential to aver in the complaint that partition cannot be made without material injury and great prejudice to the owners, to justify the admission of evidence to that effect, and to warrant an order of sale of the property. (*Id.*)

5. SUPPORT OF FINDING—"GREAT PREJUDICE TO OWNERS."—A finding that "partition cannot be made without great prejudice to the owners," is sufficiently supported by the testimony of three witnesses, without contradiction, that it would be injurious to both parties to partition the property, together with proof of the situation of the land sought to be partitioned indicating the same thing. (*Id.*)

See Jury and Jurors, 4; Res Adjudicata, 4.

PARTNERSHIP.

1. SALE—DELIVERY TO PARTNER.—Under a contract for the sale of personal property to the vendees as partners, a delivery to one of the partners is a delivery to both. (*Blumenthal v. Greenberg*, 384.)

2. EVIDENCE OF PARTNERSHIP.—In an action to recover the purchase price of property so sold and delivered, parol evidence is admissible

PARTNERSHIP (Continued).

that at the time of the sale the vendees stated, in the presence of the vendor and of each other, that they were partners. (Id.)

See Fraud, 2, 3; Insolvency, 6, 7.

PLACE OF TRIAL.

1. **ACTION AGAINST CORPORATION—PRINCIPAL PLACE OF BUSINESS—CONTRACT MADE IN COUNTY OF VENUE.**—In an action against a corporation upon a contract made in the county of the venue, the corporation is not entitled to change the place of trial to another county in which it has its principal place of business. (Whitney v. Sellers' Commission Co., 188.)
2. **ORDER CHANGING PLACE OF TRIAL—REVERSAL UPON APPEAL—AFFIDAVITS WITHOUT SUBSTANTIAL CONFLICT—KNOWLEDGE OF AFFIANTS.**—An order changing the place of trial to the county where the corporation defendant has its principal place of business will be reversed upon appeal, where the affidavits show without substantial conflict that the contract sued upon was made in the county of the venue. An affidavit by one having no knowledge of the place where the contract was made does not substantially conflict with the positive affidavits of persons who made the contract that it was made in the county of the venue. (Id.)
3. **ACTION TO QUIET TITLE—VENUE—JURISDICTION—DISMISSAL.**—An action to quiet title must be commenced in the county in which the land is situated, and if it is commenced in another county, the superior court thereof has no jurisdiction over the action, and it should be dismissed. (Waters v. Pool, 136.)
4. **PLEADING—LOCATION OF LAND—DESCRIPTION—GOVERNMENT SUBDIVISIONS—PLAT—JUDICIAL NOTICE.**—A complaint which describes the location of the land involved in such action by government subdivisions and upon a plat which is made part of the complaint, and which thus shows the land to be located in fact in another county, warrants the court in taking judicial notice of that fact, notwithstanding an averment in the complaint that the lands are situated in the county of the venue. (Id.)

PENALTY. See Gambling Contract, 19, 20.

PLEADING.

1. **ACTION TO RECOVER PERSONAL PROPERTY—CLAIM AND DELIVERY—AUXILIARY REMEDY—PLEADING AND PRACTICE.**—Claim and delivery, under our code, is not properly a form of action, but an auxiliary remedy provided for in an action for the recovery of personal property. Where the auxiliary remedy is not invoked in such an action, the provisions for claim and delivery have no application, and the action must be governed by the ordinary rules of

PLEADING (Continued).

pleading and practice. (*Faulkner v. First National Bank of Santa Barbara*, 258.)

2. **FORM OF ACTION—FACTS APPROPRIATE TO COMMON-LAW ACTIONS—PRINCIPLES APPLICABLE.**—Though there is but one form of action in this state, yet when the facts stated in a complaint are substantially those required to support a particular common-law action, the principles of pleading and practice which apply to such common-law action, are applicable to the facts pleaded. (*Id.*)
3. **BAILMENT—UNLAWFUL DETENTION—COMMON-LAW ACTION OF DETINUE—INSUFFICIENT DEFENSE—DISPOSITION OF BAILED PROPERTY—BREACH OF DUTY.**—The action in this case being based upon a contract of bailment, in which the original taking was lawful, but the detention was unlawful, the wrong is one for which the common-law action of detinue is especially appropriate. In such action, it was no defense that the defendant had voluntarily disposed of the bailed property before the commencement of the action, in breach of his duty as bailee. (*Id.*)
4. **CESSATION OF POSSESSION BEFORE SUIT—BURDEN OF PROOF.**—In an action of detinue, where the possession of the bailed property had ceased before the commencement of the action, the burden of proof is upon the defendant to show that it ceased by accident, death, or by some means beyond his control. (*Id.*)
5. **ALTERNATIVE JUDGMENT IN DETINUE—POSSESSION OR VALUE—JUDGMENT FOR VALUE ONLY.**—The usual judgment in an action of detinue is in the alternative, that the plaintiff recover the possession of the property, or its value, in case delivery cannot be had; but where it appears that delivery cannot be had, the defendant is not prejudiced by a judgment for the value only, without any alternative. (*Id.*)
6. **FACTS SHOWING CONVERSION—DEMAND AND REFUSAL—TROVER—JUDGMENT FOR VALUE.**—Under a complaint stating a demand before suit for the possession of property to which the plaintiff was entitled, and a continuous refusal of the defendant to deliver the property, a conversion is shown, which supports a recovery, in the common-law action of trover, of a judgment for the value of the property converted. (*Id.*)
7. **DETENTION OF PROPERTY—IMMATERIAL AVERMENT IN TROVER.**—In an action of trover, where the complaint is sufficient to support a judgment for value, an averment of the unlawful detention of the property is immaterial, and cannot invalidate the judgment. (*Id.*)
8. **RELIEF EMBRACED IN ISSUE—DEFENDANT NOT PREJUDICED.**—Under the code, the court, upon the trial of an action, may grant any relief consistent with the case made by the complaint, and embraced within the issue; and where the issue related to the right of the defendant to surrender the pledged notes to the pledgor, and

PLEADING (Continued).

upon that issue the defendant had scope fully to present his defense, he cannot be prejudiced by the averments of the complaint, nor by the form of the judgment in favor of the plaintiff for the value of the pledged notes unlawfully surrendered. (Id.)

9. COMPLAINT UPON NOTE—DATE OF EXECUTION—CLERICAL ERROR—COPY OF NOTE—WRITTEN NOTICE OF PAYMENT—PRESUMPTION UPON APPEAL.—In a complaint upon a note, the date of the year in an averment of its execution, which is precisely four years subsequent to the date of the note which is set out in full in the complaint, and is also subsequent to the date of a written notice of payment required by the terms of the note to be given for a period of thirty days, which described the note by its date, and which was served more than thirty days before the commencement of the action, which it appears was commenced less than thirty days after the alleged date of execution of the note, is obviously a clerical error, which must be presumed upon appeal, in the absence of the evidence, to have been corrected by the witnesses; and the written notice of payment cannot be considered as prematurely given. (*Raspadori v. Cresta*, 10.)
10. ANTEDATING OF NOTE—DELIVERY AFTER WRITTEN NOTICE—DATE IMMATERIAL—STIPULATED TIME OF PAYMENT—MATURITY OF CAUSE OF ACTION.—The date of the delivery of the note was not material to the cause of action. Even if it was antedated and delivered after the written notice of the payment, the notice would still apply to the date stated in the note, and would make it payable by agreement of the parties thirty days after the written demand for payment. It is sufficient for the maturity of the cause of action that the written notice was given more than thirty days before the commencement of the action. (Id.)
11. FORM OF ACTION—FACTS STATED—CONSTRUCTION—SUPPORT OF JUDGMENT—THEORY OF FACTS.—There is but one form of action in this state, and judgment is to be rendered upon the facts stated in the pleadings, the averments of which are to be liberally construed to support a judgment based upon any sound theory of the facts alleged. (*Marsteller v. Leavitt*, 149.)
12. CAUSES OF ACTION NOT SEPARATELY STATED—DEMURRER—MOTION.—That several causes of action are not separately stated in the complaint is not ground of demurrer, but the objection should be taken advantage of by motion that they be severed and separately pleaded. (*County of Sutter v. McGriff*, 124.)
13. COMPLAINT IN INTERVENTION—CROSS-COMPLAINT OF PLAINTIFFS—CONSTRUCTION OF CODE.—An intervention is treated in section 387 of the Code of Civil Procedure as a complaint, to which either party to the action may answer or demur as if it were an original complaint, and where it is adverse to the plaintiffs, they become defendants to the intervention, and have the right as such to file

PLEADING (Continued).

a cross-complaint thereto under section 442 of the same code. (Wall v. Mines, 27.)

See Contract, 5; Corporations, 1, 17-19, 25, 26; Comity; Duress, 1-3, 6; Ejectment; Harbor Commissioners, 2; License, 3, 4; Mechanics' Liens, 1, 8; Mortgage, 8, 9; Municipal Corporations, 2, 3; Negligence, 8; Partition, 1, 2, 4; Place of Trial, 4; Pledge, 2; Railroads, 1, 2.

PLEDGE.

1. **PLEDGOR AND PLEDGEE—BAILMENT OF PLEDGED NOTES—COLLATERAL SECURITY—UNAUTHORIZED DELIVERY TO PLEDGOR.**—Notes pledged the maker of another note to the payee, who indorsed the secured note to a bank, and deposited the pledged notes as collateral security, are subject to the rule declared in section 2996 of the Code of Civil Procedure, that "the pledge holder must enforce all the rights of the pledgee unless authorized by him to waive them." The bank, in such case, has no right without the consent or authority of the original pledgee, to deliver the pledged notes to the pledgor. (Faulkner v. First Nat. Bank, 258.)
2. **ACTION FOR POSSESSION OR VALUE OF NOTES—PRIOR SURRENDER—PLEADING—DEMAND AND REFUSAL—UNLAWFUL DETENTION.**—An action may be maintained by the pledgee against the bank for the possession or value of the pledged notes, notwithstanding their surrender to the pledgor by the bank prior to the commencement of the action, where the complaint avers the facts in regard to the deposit of the pledged notes, and alleged a demand upon the bank and its refusal to deliver them, and that it unlawfully withholds and detains them to plaintiff's damage in the alleged value of the notes. (Id.)
3. **DETINUE—TROVER—POSSESSION AT COMMENCEMENT OF ACTION NOT ESSENTIAL.**—Such complaint states facts sufficient to constitute a cause of action both in detinue and in trover, in each of which actions possession of the subject of the action at the time of its commencement is not essential to recovery. (Id.)
See Mortgage, 28; Warehouseman.

POLICE POWER. See Gambling Contracts, 9.

PRACTICE.

1. **WANT OF PROSECUTION—DEATH OF ATTORNEY—DISMISSAL.**—The trial court has jurisdiction to entertain a motion to dismiss an action for want of prosecution, made at the instance of the defendant, after the death of the attorney for the plaintiff, when the plaintiff appears at the hearing by another attorney and contests the motion on its merits, notwithstanding the failure of the defendant to demand the appointment by the plaintiff of another attorney, or his appearance in person, as provided by

PRACTICE (Continued).

section 286 of the Code of Civil Procedure. (Nicol v. San Francisco, 288.)

2. **LACHES IN PROSECUTION FOR FIVE YEARS.**—A delay of upward of five years to take any steps toward the prosecution of an action warrants its dismissal for laches; and such delay is not excused by the facts that the plaintiff's time was entirely taken up with his other business affairs, or because he intrusted the conduct of the litigation entirely to his attorney, who was negligent in its prosecution. (Id.)
3. **SETTING ASIDE DEFAULT—DISCRETION.**—The granting or denying of a motion to set aside the default of a defendant is so largely a matter of discretion with the trial court that, unless it clearly appears that there has been an abuse of this discretion, the appellate court declines to set aside the order. This discretion is best exercised when it tends to bring about a judgment upon the merits. (Nicoll v. Weldon, 666.)
4. **MOTION GRANTED ON TERMS.**—The terms imposed by the court as a condition to granting a motion of the defendant to set aside a default must, in the absence of any contrary showing, be held to be ample compensation to the plaintiff for any injury he may have suffered by the delay occasioned by the motion. (Id.)

See Appeal; Costs; Evidence; Findings; Instructions; Judgment; Jurisdiction; Jury and Jurors; New Trial; Partition; Place of Trial; Pleading; Receiver.

PUBLIC LANDS. See Swamp and Overflowed Lands.

PUBLIC OFFICERS. See Office and Officers.

QUIETING TITLE. See Mortgage, 24; Place of Trial, 3; *Res Adjudicata*, 2; Swamp and Overflowed Lands, 3; Way, 6.

QUO WARRANTO. See Reclamation District, 1.

RAILROADS.

1. **ACTION FOR DAMAGES—EJECTION OF RAILWAY PASSENGER—PLEADING—INJURY TO "GOOD NAME."**—In an action to recover damages for the unlawful ejection of the plaintiff from the passenger cars of the defendant railway company, no damages can be allowed for injury to the "good name" of the plaintiff. An averment of such injury in the complaint renders it subject to a demurrer for uncertainty, and is subject to a motion to strike it out. (Proctor v. Southern California Ry. Co., 20.)
2. **MISJOINDER OF CAUSES OF ACTION.**—Where the injury to plaintiff's "good name" is not alleged as a separate cause of action, but only as one of several injuries alleged, the complaint is not thereby rendered subject to a demurrer for misjoinder of causes of action (Id.)

RAILROADS (Continued).

3. **ABSENCE OF EVIDENCE—FINDING—HARMLESS SURPLUSAGE.**—Where no evidence was introduced at the trial to show any injury to plaintiff's "good name," the averment thereof in the complaint and a finding based upon such averment will be deemed harmless surplusage, which could not have prejudiced the defendant, and will not be held ground for reversal upon appeal. (Id.)
4. **SEPARATION OF PLAINTIFF FROM BAGGAGE—PROPER EVIDENCE—DAMAGES OCCASIONED—DISCRETION.**—In such action it is proper to show that the plaintiff's baggage was carried away from the plaintiff when ejected from the cars, and that plaintiff was thereby compelled to buy additional clothing; and the mental and physical distress of plaintiff, and any pecuniary loss thereby occasioned, may be taken into account in fixing the damages. Such damages are not susceptible of computation, and are within the sound discretion of the judge or jury passing upon the evidence. (Id.)
5. **IMPROPER ITEMS OF COMPENSATION—PRICE OF CLOTHING—GENERAL DAMAGES.**—The price of the clothing purchased is not a proper item of compensation in damages, and a special allowance therefor should be omitted from the judgment. The damages for separation from the baggage and for any loss or inconvenience thereby occasioned must be deemed compensated by the finding of general damages. (Id.)
6. **DEPRIVATION OF THROUGH TICKET—COST OF PASSAGE FROM PLACE OF EJECTION.**—The plaintiff is entitled to recover the cost of a ticket from the place of wrongful ejection to the place of the plaintiff's destination, as damages for the wrongful taking from plaintiff by the conductor of a through ticket belonging to the plaintiff. (Id.)
7. **DAMAGES NOT EXCESSIVE.**—Under the circumstances of this case, an award of general damages in the sum of four hundred and sixty dollars and fifty cents for the unlawful ejection of the plaintiff from the cars of the defendant is held not excessive, without taking into account any injury to the good name of the plaintiff. (Id.)

See Deed, 5-8; Negligence, 1, 2, 4-13.

RAPE. See Criminal Law, 55-78.

RECEIVER.

1. **RECEIVER APPOINTED PENDENTE LITE—CESSATION OF FUNCTIONS.**—The functions of a receiver appointed pending an action for divorce who took possession of no property before the judgment, terminated with the entry of the judgment. (White v. White, 597.)
2. **CONTINUANCE OF RECEIVER AFTER JUDGMENT—JURISDICTION.—VOID SALE AND DEED—WRIT OF ASSISTANCE.**—The court had no jurisdic-

RECEIVER (Continued).

tion, after the entry of the money judgment in such action, to continue the receiver for the purpose of enforcing the judgment; and a sale made by such receiver of the property of the husband, and a deed thereof made by him to the wife, are void and cannot justify a writ of assistance to the wife as purchaser. (Id.)

3. **CONSTRUCTION OF CODE—RECEIVER TO ENFORCE JUDGMENT.**—The power given under subdivision 3 of section 564 of the Code of Civil Procedure to appoint a receiver, "after judgment, to carry the judgment into effect," is to be construed as applying only to cases where the judgment affects specific property, and not as applicable to a case of an ordinary judgment for money, which may be enforced by execution. (Id.)

RECLAMATION DISTRICT.

1. **VALIDITY OF ORGANIZATION—QUO WARRANTO.**—A reclamation district regularly organized under section 3446 of the Political Code has a legal existence which cannot be successfully assailed in *quo warranto* if there is no existing swamp land or reclamation district within its limits. (People ex rel. Thisby v. Reclamation Dist. No. 556, 607.)
2. **DEFUNCT SWAMP LAND DISTRICT—REPEAL OF ORGANIC ACT—FAILURE TO REORGANIZE.**—A swamp land district organized under the act of 1861, and failing to take any steps to reorganize under the act of 1868, which substituted a new scheme for the reclamation of swamp lands, and contemplated a reorganization of existing districts thereunder and expressly repealed the act of 1861, ceased thereafter to exist, and is not an obstacle to the subsequent organization of a reclamation district including its original limits. (Id.)
3. **REPEALING ACT—CONSTRUCTION OF PROVISIO.**—The proviso in the act of 1878, which repealed the act of 1861, that "until such organization said districts now formed shall proceed under the laws now in force," is to be construed as applying to existing districts reorganizing under the repealing act, and as allowing them to proceed under the laws theretofore in force; during the period of transition, and not as intended to apply to an existing district which took no steps to reorganize under the act of 1878. [Beatty, C. J., dissenting.] (Id.)
4. **FORMER RECLAMATION DISTRICT ILLEGALLY ORGANIZED—FAILURE OF PETITION TO DESCRIBE LANDS.**—A former reclamation district illegally organized, under the Political Code, owing to the failure of the petition for its organization to set forth "a description of the lands by legal subdivision or other boundaries," is not a bar to the regular organization of another reclamation district. (Id.)
5. **GENERAL OBJECTION TO PETITION—JURISDICTION OF SUPERVISORS—OBJECTION UPON APPEAL.**—The fact that the defective petition

RECLAMATION DISTRICT (Continued).

was objected to generally at the trial, and upon other grounds than that it did not confer jurisdiction upon the supervisors to act thereupon, cannot preclude the urging of such objection upon appeal. (Id.)

6. **DE FACTO DISTRICT—SUPPORT OF FINDING.**—The *de facto* existence of the former reclamation district which has no *de jure* existence may be controverted; and a finding against its *de facto* existence is sufficiently sustained by proof that after the board of supervisors had approved the insufficient petition nothing further was done for over fifteen years, when it first began to act as a corporation, and acted for about one year, when it ceased to act entirely, and its members and officers long subsequently united in the regular organization of the reclamation district respondent. (Id.)
7. **MONEY IN POSSESSION OF PRESIDENT—PAYMENT TO COUNTY TREASURER—MANDAMUS.**—A writ of mandate will not lie, at the instance of a creditor of a reclamation district, the lands of which are situated in different counties, against the person who is the president of the board of trustees of the district, to compel him to pay to the treasurer of one of such counties a portion of the district funds, collected by him and in his possession as agent of the board. The making of such payment is no part of the official duty of the president, and a writ of mandate will only lie to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. (*Angus v. Browning*, 502.)

RECORDATION. See Mortgage, 22, 23, 31, 32.

REFORMATION. See Mortgage, 14-17.

REMITTITUR. See Appeal, 1-3.

RES ADJUDICATA.

1. **PARTIES AND PRIVIES BOUND—DIFFERENT CAUSE OF ACTION.**—The right question, or fact definitely put in issue, and finally determined by a court of competent jurisdiction, cannot be contested in a subsequent action between the same parties or their privies, even if the second suit is for a different cause of action. (*Green v. Thornton*, 482.)
2. **ACTION TO QUIET TITLE—FORMER ADJUDICATION—EJECTMENT SUIT BY PLAINTIFF'S GRANTOR.**—In an action to quiet title, the principles adjudicated in a former action of ejectment brought by plaintiff's grantor against the same defendant are binding upon the plaintiff, where it appears that substantially the same evidence, documentary and parol, was introduced and considered in both cases, and the plaintiff relied upon the same title which was adjudicated against his grantor in the action of ejectment. (Id.)

RES ADJUDICATA (Continued).

3. DECREE OF DISTRIBUTION—QUESTION OF HEIRSHIP.—A final decree of distribution, properly entered and not appealed from, is conclusive upon the question of heirship therein adjudicated, and cannot be collaterally assailed in any other action involving the question of the heirship of the decedent. (Quirk v. Rooney, 505.)
4. CONCLUSIVENESS OF JUDGMENTS IN PARTITION SUIT—ALLEGED TRUST OF DISTRIBUTEE FOR HEIRS—NEW ACTION—EXPRESS TRUST.—An interlocutory judgment which has become final, and a final judgment not appealed from, in an action for partition, and to enforce a trust in favor of other alleged heirs of a deceased person, against the distributee of his estate, adjudging that such alleged heirs had no interest in the land distributed, are conclusive upon all of the claimants as to any trust of the distributee in their favor, and are a bar to a subsequent action by one of them to enforce a trust against the distributee, based upon new evidence claimed to establish an express trust of the distributee in favor of alleged heirs of the decedent, including the plaintiff. (Id.)
5. DIFFERENT SUITS—DIFFERENT MODES OF ESTABLISHING SAME TITLE. It is not the policy of the law to allow different suits to be brought between the same parties in regard to the same subject matter, merely because there may be different modes of establishing title to the property which is the subject matter of the different suits. (Id.)
6. NEW ACTION UPON SAME TITLE—NEW EVIDENCE.—The doctrine of *res adjudicata* will not permit a new action to be brought for the enforcement of the same title between the same parties, merely because new and different evidence may be adduced in support of it. The plea is applicable to every matter which was open to litigation within the legitimate scope of the pleadings in the first suit, and which might have been presented with reasonable diligence upon the trial thereof. (Id.)

RESCISSION. See Contract, 9-11; Corporations, 7.

RIGHT OF WAY. See Way.

RIVERS. See Boundaries.

SALE. See Contract, 6; Estates of Deceased Persons, 8-10; Insolvency, 1-4, 6, 7; Landlord and Tenant, 1, 2; Partnership.

SCHOOLS. See Electors, 2.

SPECIFIC PERFORMANCE.

1. CONTRACT FOR LIFE TENANCY—PERSONAL SERVICES—SPECIFIC PERFORMANCE—REMEDY AT LAW.—An oral agreement between a father and daughter that he would give her and her family the rent of his home free for life, and would leave her by will the residue of his

SPECIFIC PERFORMANCE (Continued).

estate, subject to certain bequests, in consideration of her promise to provide him a home therein and supply his personal wants for life, is a contract on her part to render personal services during the life of her father, and cannot be specifically enforced by either party. For any breach of the contract while unperformed on her part, the parties must be left to their remedy at law. (*O'Brien v. Perry*, 526.)

2. **BREACH OF CONTRACT—TENANCY AT WILL—NOTICE TO QUIT—UNLAWFUL DETAINER—INJUNCTION.**—Upon breach of the contract by the father, in refusing to remain to be provided for, and treating the occupation of his house by the daughter and her family thereafter as a tenancy at will, and, after giving them notice to quit, bringing an action of unlawful detainer against them, the daughter, not being entitled to a specific performance of the contract, cannot defend such action as a life tenant, and is not entitled to an injunction to restrain interference of the father with her occupation of the premises. (*Id.*)

See *Compromise*, 1.

STATUTES.

1. **CONSTRUCTION OF STATUTES—REPEAL BY IMPLICATION NOT FAVORED.**
The law does not favor a repeal by implication, and where there are two or more provisions in relation to the same subject matter, they must, if possible, be construed so as to maintain the integrity of both; and the repugnancy between them should be very clear to sustain a repeal by implication. (*People ex rel. Board of State Harbor Commrs. v. Pacific Imp. Co.*, 442.)
2. **SPECIAL AND GENERAL STATUTES.**—Where a special and a general statute treat of the same subject, the special act will control as to its special provisions, and will not be deemed repealed by implication by a latter general statute, although the terms of the general statute, taken strictly, would include the terms of the special statute, if they are not irreconcilably inconsistent, and if there is no manifest intention of the legislature to repeal or alter the special statute. (*Id.*)
See *Constitutional Law*.

STATUTE OF FRAUDS.

1. **VERBAL PROMISE TO ANSWER FOR THE DEBT OF ANOTHER—RECEIPT OF PROPERTY—ORIGINAL OBLIGATION.**—A mere verbal promise to answer for the debt or default of another person is void under the statute of frauds; but a verbal promise made by one who has received property from the debtor under an agreement to apply it or its proceeds in payment of his debt to another person is founded upon a sufficient consideration, and is an original obligation, not within the statute of frauds. (*Tevis v. Savage*, 411.)

STATUTE OF FRAUDS (Continued).

2. **PROMISE OF CORPORATION PURCHASING FRUIT—PAYMENT OF VENDOR'S DEBT—GENERAL AGENCY—AGENT NOT LIABLE.**—A verbal promise by the general agent of a corporation which, through the general agent, purchased fruit from a vendor, who had before purchased it from the plaintiff upon credit, that the corporation would see the plaintiff paid, and that when it sold the purchased fruit and received returns he would pay plaintiff's bill, is binding upon the corporation; but the agent, who was dealt with and treated as such by the plaintiff, cannot be held personally liable upon the promise. (Id.)
3. **ORIGINALITY OF PROMISE—POSSESSION OF FRUIT—INDEBTEDNESS TO VENDOR.**—The promise of the corporation to pay the debt of its vendor to the plaintiff was original, and not within the statute of frauds, regardless of whether the fruit was received by it upon the understanding that it was to pay the plaintiff from the proceeds, or whether, after the possession of the fruit was received and while it still owed its vendor therefor, it undertook to apply the proceeds of sale to the payment of its vendor's debt to the plaintiff. (Id.)

STATUTE OF LIMITATIONS.

1. **ORAL CONTRACT—DEED OF MINE—VERBAL AGREEMENT TO PAY UPON RESALE.**—A cause of action upon an oral contract to pay a specified sum upon the resale of a mine deeded by the promisee to the promisor, together with the sale of other mines belonging to the promisor, accrued at the time of such resale, and is barred within two years thereafter under subdivision 1 of section 339 of the Code of Civil Procedure. (Patterson v. Doe, 333.)
2. **ACTION AGAINST EXECUTORS—NONSUIT.**—In an action upon such cause of action against the executors of the deceased promisor, the executors are entitled to a nonsuit, on the ground that the action is barred by the statute. (Id.)
3. **EFFECT OF DEED OF MINE—INSTRUMENT IN WRITING.**—The deed of the mine cannot be considered as a written instrument taking the oral agreement out of the statute, there being no acknowledgment or promise contained in the deed relative to the verbal understanding between the parties. The cause of action is not founded upon an instrument in writing, within the meaning of the code, merely because such an instrument would be a link in the chain of evidence establishing the cause of action, if it does not contain or prove the contract sued upon. (Id.)
4. **LETTER UPON PREVIOUS UNCONSUMMATED TRANSACTION—ABSENCE OF PROMISE—IRRELEVANCY.**—A letter from the decedent written in relation to a previous unconsummated transaction for the transfer of the mine by plaintiff directly to another party, to the effect that "if the sale goes through, the money comes through me," does not contain a promise, and has no relevancy to the verbal contract made at the time of the deed to the decedent. (Id.)

STATUTE OF LIMITATIONS (Continued).

5. **OMISSION TO FIND UPON PLEA—FACTS SHOWING ACTION NOT BARRED.**
The failure of the court to find upon a plea of the statute of limitations set up in the answer of the defendants is not ground for a reversal of the judgment upon appeal where the facts found or admitted show that the action was not barred. (*Woodham v. Cline*, 497.)
6. **RUNNING OF STATUTE—ACTION FOR CONVERSION—AMENDMENT OF COMPLAINT—ORIGINAL AVERMENTS OF TRESPASS—SURPLUSAGE.**—The statute of limitations for the wrongful conversion of personal property will not run after the commencement of an action to the date of filing an amended complaint, where the original complaint stated the same cause of action, though it superadded thereto averments showing a trespass upon plaintiff's property. Such averments of trespass may be regarded as surplusage. (*Id.*)
7. **SUPPORT OF JUDGMENT—CONSISTENCY OF FINDINGS—SEPARATE ITEM—PRESUMPTION OF WRITTEN CONTRACT.**—A general finding that no part of plaintiff's cause of action is barred by the statute of limitations is not to be deemed inconsistent with a finding upon an item more than two years old and less than four years old not included in a written contract set forth in the answer and findings. It must be presumed from the general finding that such item was based upon a written contract. (*Ryland v. Heney*, 426.)
8. **BARRED ITEM—MODIFICATION OF JUDGMENT.**—An item shown in the findings to be barred by the statute of limitations is ground only for a modification of the judgment, by proper reduction thereof, and not for a reversal thereof, merely because of the inconsistency of such items with other findings. (*Id.*)

See Appeal, 5; Contract, 3-5; Gambling Contracts, 19; Mortgage, 11; Sureties, 1-9; Trust, 13.

STOCK AND STOCKHOLDERS. See Corporations; Gambling Contracts.

STREETS, ROADS, AND HIGHWAYS. See Eminent Domain; Municipal Corporations; Way.

STREET ASSESSMENT.

1. **STREET IMPROVEMENT—TIME FOR COMPLETION OF WORK—EFFECT OF APPEAL—SETTING ASIDE ACCEPTANCE—JURISDICTION TO EXTEND TIME.**—An appeal taken to the city council before the expiration of the time allowed to complete a street improvement, and after the work has been accepted as complete, operates to suspend the running of the time originally allowed, and, upon the city council setting aside the acceptance, It has jurisdiction to extend the time for the final completion of the work. (*Hadley v. Dague*, 207.)

STREET ASSESSMENT (Continued).

2. **ASSIGNMENT OF CONTRACT—COMPLETION OF WORK BY ASSIGNEE—ASSESSMENT AND WARRANT.**—The contractor may assign the contract before the completion of the work, and where the work is completed by the assignee, the warrant accompanying the assessment may run in favor of the assignee named therein as assignee of the original contractor also named, and such assignee may demand and enforce the assessment. (Id.)
3. **REFERENCE TO BONDS IN WARRANT—DESCRIPTION AND NOTICE.**—Where the resolution of intention showed that the cost of the improvement would exceed one dollar per front foot, and that serial bonds would be issued to cover the cost under the provisions of the act of 1893, a reference to the bonds in the warrant giving a general description of them as "serial bonds bearing interest at the rate of six per cent per annum and extending over a period of ten years from their date of issue, to represent the cost and expenses of the work described in the assessment, and in the manner and form prescribed by law," and giving the notice provided for in the act of 1893 relative to the issuance of a bond of fifty dollars or more to represent each assessment, etc., shows a sufficient compliance with that act. (Id.)
4. **DIRECTIONS BY COUNCIL—COMPLETION OF WORK—SUPERVISION OF COUNCIL—ACTION OF SUPERINTENDENT—NEW ASSESSMENT.**—Where the city council upon appeal, after vacating the acceptance of the work by the street superintendent and a former assessment based thereon, directed the contractor to complete the work required by it "under the direction of the city council," and that when so done the superintendent should accept the work, and issue a new warrant, assessment, and diagram, such directions are in strict compliance with section 11 of the street improvement act. (Id.)
5. **ACCEPTANCE OF WORK—INDORSEMENT BY SUPERINTENDENT UPON NEW ASSESSMENT.**—Where the completed work was accepted by the council, and the formal acceptance of the superintendent appeared upon the face of the new assessment, authenticated by his signature, his indorsement upon the assessment stating that the work was performed under the supervision of the council and accepted by it, and not under his control or supervision, and was not accepted by him, and that he disclaimed all responsibility for the work, and signed and delivered the assessment and warrant upon the order and authority of the council, cannot qualify his formal acceptance of the work and is not inconsistent with the proper direction of the council (Id.)
6. **RECORD BY SUPERINTENDENT—PRIMA FACIE EVIDENCE—RECORD PRESUMED.**—The street improvement act does not require that the evidence of the recording of the warrant, assessment, and diagram and certificate of the engineer in the office of the superintendent of streets shall be offered as a part of the *prima facie* evi-

STREET ASSESSMENT (Continued).

- dence sufficient to entitle the plaintiff to recover; but the *prima facie* character given to those documents, together with the affidavit of demand and nonpayment, includes the proper recording of the instruments required to be recorded, if there is no evidence to show the contrary. (Id.)
7. **CERTIFICATE OF ENGINEER NOT SHOWING RECORD.**—The fact that the certificate of the engineer offered in evidence does not show that it was recorded cannot vitiate it, in the absence of evidence tending to show that the certificate was not recorded. (Id.)
8. **CONSTRUCTION OF RESOLUTION OF INTENTION—COST OF WORK—INTERSECTIONS—FINDING BY BOARD—PRESUMPTION.**—A resolution of intention in which it is found that the cost of the improvement will be more than one dollar per foot along each line of the street, "including the cost of intersections," must be construed as referring to the "cost of intersection work assessable upon said frontage," and where there is nothing in the record to show that the finding of the board that the cost of the improvement would exceed one dollar per front foot was not based upon a proper calculation, it must be presumed that it was so based, the *prima facie* evidence of the plaintiff's case not being overcome. (Id.)
9. **FINDING MADE IN RESOLUTION—SEPARATE ORDINANCE NOT REQUIRED.** The finding as to the cost of the improvement was properly embodied in the resolution declaring the intention of the board to order the improvement, and need not be embodied in a previous separate ordinance finding such cost. (Id.)
10. **CONSTITUTIONALITY OF STREET IMPROVEMENT ACT—APPORTIONMENT OF EXPENSE ACCORDING TO FRONTAGE—BENEFIT FROM WORK.**—The street improvement act, in providing for apportioning the expense of a street improvement according to the frontage of the lots along the street, is constitutional and valid. It is to be deemed a legislative declaration that the property within the district improved will receive a benefit from the improvement in proportion to its frontage upon the work; and in the absence of any facts showing that a particular assessment, so based, is unjust and not according to benefits, the statute in its application thereto cannot be deemed unconstitutional, and it is the duty of the court to uphold the assessment. (Id.)
11. **STREET IMPROVEMENT—BOND GUARANTEEING WORK FOR ONE YEAR—VOID CONTRACT AND ASSESSMENT.**—An ordinance requiring that the contractor for a street improvement shall give a bond in a sum to be determined by the mayor guaranteeing the work for one year from injury by ordinary use, is unauthorized, improperly increases the burdens of the property owner for the additional expense of necessary repairs for twelve months, and makes the contract and assessment void. (*Alameda Macadamizing Co. v. Pringle*, 226.)

STREET ASSESSMENT (Continued).

12. **DUTY OF OFFICERS—SUBSTITUTION OF BOND.**—A bond cannot be substituted for the performance of the duty of the officers required to see that the work under the contract is properly done. (Id.)
13. **EVIDENCE—CERTIFICATE OF CITY ENGINEER.**—In an action to foreclose the lien of a street assessment, a certificate of the city engineer stating that a record in his office of another certificate shows that the work of grading specified "was examined and found to be practically right for official line and grade," should be excluded from evidence, and, if admitted, is insufficient to sustain the plaintiff's case. (*Obermeyer v. Patterson*, 531.)
14. **AUTHENTICATION OF RECORD—ENGINEER'S CERTIFICATE.**—In an action to foreclose a street assessment, where the certificate of the engineer appears to have been recorded in its proper place, together with the original assessment, warrant, and diagram, and the certificate of record appended thereto by the superintendent of streets shows by reference to the page of the record that all the documents, including the engineer's certificate, having been recorded, the fact that in assuming to re-enumerate in his certificate the documents recorded he omits the engineer's certificate does not invalidate the authentication of the record or impair the lien of the assessment. (*Greenwood v. Chandon*, 467.)

SUMMONS. See *Jurisdiction*, 1, 2.

SURETIES.

1. **ACTION AGAINST SURETIES—STATUTE OF LIMITATIONS—WRITTEN REQUEST FOR DELAY—CONTRACT TO WAIVE STATUTE—ESTOPPEL.**—Sureties sued upon a bond are estopped to plead the statute of limitations where, pending the running of the statute, they signed a written request for delay in proceedings against them, until they should request further proceedings, and agreed in writing to waive all advantage which might result from the delay requested, in consideration of which request and promise the plaintiffs forbore to sue for a period of years. (*State Loan etc. Co. v. Cochran*, 245.)
2. **VALIDITY OF CONTRACT—CONSISTENCY WITH CODE—WRITTEN PROMISE.**—The written contract to waive the statute of limitations was not in contravention of section 360 of the Code of Civil Procedure, but was a written promise within the language of that section, which took the case out of the bar of the statute. (Id.)
3. **RUNNING OF LIMITATION SUSPENDED—EXTENSION OF TIME.**—Apart from statute, it is recognized law that if, pending the running of the statute of limitations, the time of payment is extended by the creditor with the debtor's assent, the statute does not run during the time of the suspension. (Id.)
4. **FORBEARANCE OF CREDITOR AT DEBTOR'S REQUEST.**—Where the creditor forbears to sue, upon the written request of the debtor, the debtor will be estopped to plead the statute, the running of which

SURETIES (Continued).

is suspended during the time of the forbearance as requested. (Id.)

5. **PUBLIC POLICY—AGREEMENT FOR LIMITED TIME—MAXIM.**—An agreement to waive the statute of limitations for a limited time is not against public policy; but the general rule applicable thereto is embodied in the maxim, "*pacta legem faciunt inter partes.*" (Id.)
6. **CONSIDERATION—ACCEPTANCE OF PROMISE—COMPLIANCE WITH REQUEST.**—The mere acceptance of the naked written promise of the obligor to waive the statute would not make it a binding contract; but the compliance of the obligee with the obligor's written request for delay, upon the faith of the promise, constituted a sufficient consideration for the promise and made it effective to suspend the statute while the parties acted as agreed. (Id.)
7. **RECOMMENCEMENT OF STATUTE.**—The statute of limitations does not commence to run again from the date of the written promise, but only from the time when the parties have ceased to act upon it as agreed. (Id.)
8. **SUBSTITUTION OF NEW SURETY—COSURETIES NOT RELEASED FROM AGREEMENT.**—The substitution of a new surety, who is not bound by the agreement of the other sureties to waive the statute of limitations, does not have the effect to release the other sureties from their agreement, or to make the limitation run from its date, or to render their obligation any different from what it would have been if the substitution had not been made. (Id.)
9. **HARMLESS ERROR IN INSTRUCTION—MISCONSTRUCTION OF CONTRACT —PERIOD OF DELAY—SUSPENSION OF LIMITATION.**—An erroneous instruction, based upon a misconception of the contract, thereby shortening the time of agreed delay and making the statute run only from the expiration of that time, without including the time of the original delay, is harmless, without reference to the question of a mere suspension of the period of limitation, where it appears that, under a true construction of the contract, the period of agreed delay for all purposes was such as to preclude any successful plea of the statute. (Id.)
10. **BOND OF BANK SECRETARY—COLLECTION OF COLLATERAL SECURITIES —CHANGES BY BANK—CONSENT OF ONE SURETY BINDING UPON COSURETIES.**—Where the bank plaintiff, upon the bond of whose deceased secretary the defendants were sureties, during the period of delay requested by them, proceeded to realize upon the collateral securities of the deceased principal in its hands, the consent of one of the defendant sureties to changes in the disposition of the collateral securities held by the bank, including extensions of time and renewals of notes, and compromises there of, and payments in property, is binding upon all of the sureties, and none of them can claim any release from liability on the bond by reason of such proceedings. (Id.)

SURETIES (Continued).

11. **POWER OF COSURETY—JOINT DEBTOR.**—Though one joint debtor cannot, without the consent of his codebtors, make new contracts, or revive a debt barred by the statute of limitations, he has power to act for the others in reference to the contract by which the relation was created; and cosureties on the same bond have each power to act with reference to collateral securities given by the principal to the obligee of the bond. (Id.)
12. **INSTRUCTION AS TO POWER OF SURETY—CONDITION WITHOUT EVIDENCE—CHARGE OF COLLATERALS BY COMMITTEE OF SURETIES—HARMLESS ERROR.**—An instruction correctly stating the power of one surety to bind the others by consent to the action of the bank in disposing of collaterals is not rendered prejudicially erroneous, because not given absolutely, but conditionally upon a finding by the jury that the bank appointed the sureties a committee to have charge of the collaterals, which finding there was no evidence to sustain. (Id.)
13. **NONSUIT—PROOF OF CAUSE OF ACTION—EXCESS IN VERDICT NOT PROVED—APPEAL—RELEASE OF EXCESS.**—In an action against the sureties on the bond, proof that the secretary of the bank, the principal in the bond, loaned money of the bank to himself, the notes for which were renewed in another name, that unauthorized loans by him were not paid, that he misappropriated money of the bank received by him, and converted to his own use collaterals belonging to the bank, is sufficient to prevent a nonsuit, and to support a verdict against the sureties, except as to an excess not proved. Such excess must be released with interest, as a condition of affirming the judgment upon appeal. (Id.)

See Appeal, 13-16; Arrest; Injunction; Mechanics' Liens, 3-5.

SWAMP AND OVERFLOWED LANDS.

1. **SWAMP AND OVERFLOWED LAND—IRREGULAR PLATTING AND LISTING TO STATE—MEANDERING LINE—CHARACTER OF LAND—CONCLUSIVENESS OF DETERMINATION.**—An irregular platting and listing of swamp and overflowed land to the state, not conforming to the requirements of the act of Congress, relating to legal subdivisions of land, but bounding the land platted and listed by a meandering line which excluded from its limits the smaller portion of some legal subdivisions and included therein the smaller portion of other legal subdivisions, is nevertheless a conclusive adjudication that all of the lands so platted and listed are swamp and overflowed, and that all of the lands excluded from the plat are not swamp and overflowed, but belong to the United States. (Bates v. Halstead, 62.)
2. **FEDERAL AND STATE PATENTS—SMALLER PART OF LEGAL SUBDIVISION.**—A patent from the United States of the smaller part of a legal subdivision of land excluded from the limits of such meandering line will prevail over a state patent granting the major

SWAMP AND OVERFLOWED LANDS (Continued).

part of the same legal subdivision as swamp and overflowed lands within the limits of the meandering boundary. (Id.)

3. **ACTION TO QUIET TITLE—MISTAKE OF LAND DEPARTMENT NOT INVOLVED.**—If it be conceded that the land department made a mistake in the manner in which the land was platted and listed to the state, such mistake cannot be reached in an action by the holder of the United States patent to quiet his title thereunder as against the holder of the state patent. Such action involves only the legal title to the land patented. (Id.)

See Reclamation District.

TAXATION. See Adverse Possession, 2; Irrigation District; License.

TELEGRAPH COMPANIES.

1. **TELEGRAPHS—MISTAKE IN MESSAGE—CARE AND DILIGENCE—CONSTRUCTION OF FINDING.**—In an action for damages caused by a mistake in a telegraphic message sent in reply to a message from the plaintiff, a finding that the telegraph company was not guilty of gross or any degree of negligence in the transmission and delivery of the message, or in the error or mistake therein, is to be construed as equivalent to an express finding that the company used great care and diligence in its transmission and delivery. in pursuance of section 2162 of the Civil Code. (Coit v. Western Union Tel. Co., 657.)
2. **STIPULATION IN REQUESTED MESSAGE—LIMITATION OF LIABILITY—UNREPEATED MESSAGE—PARTIES BOUND BY CONTRACT.**—A stipulation in the message transmitted to the plaintiffs in answer to their request therefor, limiting the liability of the telegraph company for mistakes or delays in transmission of an unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, is valid and binding equally upon the sender and receiver of such message, in the absence of proof of willful misconduct or gross negligence of the telegraph company in the performance of its duty. (Id.)
3. **AGENCY OF SENDER FOR RECEIVER.**—The sender of the message in response to a message from the plaintiffs was the agent for the plaintiffs in sending it, and the plaintiffs receiving the message are bound by the contract of the sender with the telegraph company as principal. (Id.)
4. **PRIVITY OF CONTRACT—CAUSE OF ACTION IN TORT.**—The addressee of a message, where there is no privity of contract, may rest his action upon tort for a breach of public duty by the telegraph company; but in a case where he is party to a special contract, either directly or indirectly through the sender as his agent, in

TELEGRAPH COMPANIES (Continued).

an action against the company he must stand upon his contract rights. (Id.)

5. **ABSENCE OF MISCONDUCT OR GROSS NEGLIGENCE—MISTAKE CAUSED BY ATMOSPHERIC DISTURBANCE.**—Where it appears that there was no willful misconduct, and that the mistake complained of was caused in an unrepeatd message requested by the plaintiffs, by reason of atmospheric disturbance during a prevailing storm, causing the line to work badly, the line being otherwise in good working order, when the message was sent, a finding that there was no gross negligence in the sending of the message will not be disturbed for insufficiency of evidence. (Id.)
6. **DUTY OF TELEGRAPH COMPANY—PRESENCE OF STORM.**—It was the duty of the telegraph company to forward the telegram at the earliest practicable moment; and the fact that a storm was prevailing over the route and that the action of the elements upon the wire could not be overcome by care and diligence, does not of itself convict the telegraph company of gross negligence in sending the message during such storm, and in not waiting for climatic changes for the better before sending it. (Id.)

TENANTS IN COMMON. See Partition, 1.

TRUST.

1. **ESTATES OF DECEASED PERSONS—TRUST FUND—IDENTITY—PRESENTATION OF CLAIM.**—Where a trust fund held by a deceased person is susceptible of identification, the trust may be enforced without the presentation of a claim against the estate; and it is only where the trust fund cannot be identified that the presentation of a claim against the estate, within the time limited by law, is essential. (Byrne v. McGrath, 316.)
2. **TRUST FUND CREATED BY WILL—INVESTMENT IN DRUG BUSINESS—IDENTIFICATION OF FUND—FINDING AGAINST EVIDENCE.**—In an action to enforce a trust against the estate of a deceased husband, created under the will of his deceased wife, for the support, maintenance, and education of their children, evidence showing that he received two thousand five hundred dollars from her estate as trustee thereof, and added thereto five hundred dollars intended as an advance for the children, and invested the whole in a drug store and business, which he conducted until his death, sufficiently establishes the identification of the trust fund, and a finding that neither the property purchased nor the proceeds thereof were traced and identified as constituting the trust fund is against the evidence. (Id.)
3. **EFFECT OF ADVANCE MADE BY HUSBAND—INTENTION—PROPORTIONATE INTEREST—MINGLING OF FUNDS—ACCESSION TO TRUST FUND.**—The effect of the money advanced by the husband, though not passed upon in the findings, could not, in any aspect, materially affect the identity of the trust fund. The evidence was sufficient

TRUST (Continued).

- to support a finding that it was intended as an advance to the children; but if it were otherwise, he could have only a proportionate interest in the fund, and if he mingled his money with the trust fund, it would become part of it by accession. (Id.)
4. ACCOUNTING AT DEATH OF HUSBAND—BALANCE OF FUND—REPAYMENT OF ADVANCE.—The advance by the husband cannot be material, where the evidence shows that upon an accounting of the business at his death the balance would be largely against him, after deducting and repaying all money advanced by him. (Id.)
 5. IDENTITY OF DRUG STORE AND BUSINESS—CHANGE OF MATERIALS—PERMANENT ENTITY.—The question of identity of the trust fund invested in the drug store does not relate to the specific items of stock, fixtures, etc., constituting the store at the time of the purchase, but relates to the drug store or business regarded collectively as a thing or entity, distinct from the mutable and transitory materials belonging to the concern, which collective thing constituted the trust fund and remained the same, though the materials, like the particles of water in a river, were continually changing. (Id.)
 6. RIGHTS OF BENEFICIARIES AGAINST ESTATE—CREDITORS OF DECEASED.—The beneficiaries of a trust fund held by a deceased person, which is satisfactorily identified, may enforce it against the administrator; and the creditors of the deceased who merely loaned him their money on the fictitious credit of the trust fund held by the deceased cannot successfully resist an action to enforce the trust. (Id.)
 7. LIMITED TRUST NOT TERMINATED—APPOINTMENT OF TRUSTEE.—The limited trust created by the will of the deceased wife for the maintenance, support, and education of the children did not terminate upon the death of the husband; and in enforcing the trust against the estate upon their suits, another trustee will be appointed to take charge of the trust fund, as successor to the deceased. (Id.)
 8. TRUST LIMITED TO LIVES—REMAINDER UNDISPOSED OF—SUCCESSION. The trust so created under the will of the deceased wife cannot extend beyond the lives of the children; and the remainder, not being disposed of by her will, passed by intestate succession, one-third to the father and two-thirds to the children. (Id.)
 9. QUIETING TITLE—INCOMPETENT DEFENDANT—DEED TO PLAINTIFF—TRUST RELATION—FINDINGS AGAINST EVIDENCE.—In an action by a sister of a defendant adjudged incompetent, to quiet title derived from his deed to her, findings that he was competent when he made the deed, that it was not procured by fraud or undue influence, and that plaintiff paid an adequate consideration therefor, are against evidence which shows that defendant's habits of

TRUST (Continued).

intoxication had long before impaired his capacity to manage his property, that he reposed special confidence in his sister, that he made the deed to her without consideration, other than an expectation of support, that she declared that the property was to be managed by her for his benefit, and that for a long time she regarded herself and acted as his trustee of the property, to be accounted for with vouchers, until she finally repudiated the trust. (Odell v. Moss, 352.)

10. **DEFINITE AGREEMENT FOR SUPPORT AS CONSIDERATION—FAILURE OF PROOF.**—Evidence showing a mere expectation on the part of the brother that the sister was going to pay for his support the sum of seventy-five dollars per month, without any testimony of the plaintiff that there was such an agreement, and without the production of any written contract to that effect, does not establish such an agreement as a consideration for the deed. (Id.)
11. **BROTHER AND SISTER—FIDUCIARY RELATION—SPECIAL TRUST AND CONFIDENCE.**—The mere relationship of brother and sister is not of itself fiduciary, but it is a material circumstance in determining whether, as matter of fact, a fiduciary relation existed between them, which is more easily superinduced by reason of the blood relationship; and where it appears that special trust and confidence is reposed by one of them in the other, the one who occupies the superior position has the duties and responsibilities of a trustee, with the attendant consequences of the trust relation. (Id.)
12. **DEED FROM BENEFICIARY TO TRUSTEE—WANT OF ADEQUATE CONSIDERATION—PRESUMPTION—CONSTRUCTIVE FRAUD—UNDUE INFLUENCE—BURDEN OF PROOF—FINDING AGAINST EVIDENCE.**—A deed from a beneficiary to a trustee without adequate consideration is presumed invalid and constructively fraudulent, and to have been obtained by undue influence. The trustee has the burden of proving the contrary, and of showing a compliance on his part with every equitable prerequisite to the validity of the deed; and in the absence of such proof, a finding that the deed was not obtained by fraud or undue influence is unsupported by the evidence. (Id.)
13. **STATUTE OF LIMITATIONS—PAROL CONTINUING TRUST NOT CONSTRUCTIVE—REPUDIATION—KNOWLEDGE OF BENEFICIARY.**—A parol trust, voluntarily assumed, which, by the understanding of the parties, was to be a continuing one, is not merely constructive; and the statute of limitations does not begin to run in such case against the beneficiary until a repudiation of the trust by the trustee has been brought home to the knowledge of the beneficiary. (Id.)
14. **HOMESTEAD ENTRY—TITLE—FRAUD UPON GOVERNMENT—ILLEGAL CONTRACT.**—A contract between a father, who was entitled to make a homestead entry, and his son, who, without the father's orig-

TRUST (Continued).

inal knowledge or consent, had by fraud and perjury made an entry in his own name, that the son should thereafter proceed and make proofs, and obtain title from the government for the father's benefit, and then convey the same to the father, is illegal and void. An action by the father to enforce a trust in the title so acquired by the son, necessarily depending upon the enforcement of the illegal contract, cannot be maintained. (*Moore v. Moore*, 110.)

See Corporations, 27; *Res Adjudicata*, 4.

UNLAWFUL DETAINER. See Justice's Court.

VENDOR'S LIEN. See Mortgage, 9, 12, 13.

VENUE. See Place of Trial.

WAREHOUSEMAN.

1. **WAREHOUSE RECEIPT—CONTRACT TO RETURN WHEAT—EXCEPTION—**
"DAMAGE BY THE ELEMENTS"—ACT OF GOD.—A warehouse receipt for wheat, agreeing to deliver it, "damage by the elements excepted," upon surrender of the receipt and payment of storage charges, creates an absolute liability to return the wheat, unless prevented by the act of God. "Damage by the elements" is the equivalent of the phrase "act of God." (*Pope v. Farmers' Union*, 139.)
2. **FIRE OF INCENDIARY ORIGIN—RECOVERY OF VALUE OF WHEAT.**—Wheat destroyed or damaged by a fire of incendiary origin is not destroyed or damaged by the act of God. The owner is entitled to recover the value of the wheat so destroyed or damaged. (*Id.*)
3. **ABSENCE OF NEGLIGENCE OF WAREHOUSEMAN—DEFENSE.**—The absence of negligence on the part of the warehouseman is no defense to an action to recover the value of the wheat destroyed by an incendiary; and it is not required to be shown that the warehouseman was negligent. (*Id.*)
4. **BURDEN OF PROOF.**—Where no issue was raised as to the existence of the contract, the plaintiff need not produce any proof; but it was incumbent upon the defendant to prove that the wheat was in fact destroyed or damaged by the elements. (*Id.*)

WATER AND WATER RIGHTS.

1. **DISTRIBUTION OF WATER—PUBLIC USE—TENDER OF RATES—CONDITION OF SUPPLY—DUTY OF WATER COMPANY.**—Under the provisions of section 1 of article XIV of the constitution, and of the act of March 12, 1885, to enforce the same, the sale, rental, or distribution of water is declared to be a "public use," and it is made the duty of a water company supplying water for distribution to furnish water upon tender of the established rates, and no

WATER AND WATER RIGHTS (Continued).

other duty than such tender can be lawfully prescribed or imposed by such company as a condition for supplying water as required by law. (*Crow v. San Joaquin etc. Irr. Co.*, 309.)

2. **REFUSAL TO SUPPLY WATER FOR IRRIGATION—NONPAYMENT OF PREVIOUS RATES—RULE SUBSCRIBED BY DISTRIBUTE.**—The refusal of an irrigation company to supply water to a distributee for irrigation of his land, upon tender of the established rates therefor, cannot be justified on the ground that the rates for previous years are unpaid, and that by a regulation of the company subscribed by the distributee it was made a condition precedent to the right to receive water that all dues and claims for previous supplies should first be paid. [*Beatty, C. J., and McFarland, J., dissenting.*] (*Id.*)
3. **CONSIDERATION OF CONTRACT—DUTY OF COMPANY.**—The subscription to such rule, considered as a contract for all future time, is without consideration, it being the duty of the irrigation company to furnish water to a distributee at the established rates, whether the distributee agreed to the regulations or not. [*Beatty, C. J., and McFarland, J., dissenting.*] (*Id.*)
4. **DAMAGES FOR REFUSAL—PROXIMATE DETRIMENT—SPECULATIVE LOSS OF PROFITS NOT ALLOWABLE.**—The damage arising from a breach of contract, or in tort, is the detriment proximately caused thereby; and for the refusal of an irrigation company to supply water at its established rates, a loss of profits which the plaintiff might have realized from an unplanted crop, which he would have planted if he had had the water, is too remote and speculative to be allowed as damages. (*Id.*)
5. **MEASURE OF DAMAGES—DIMINUTION IN RENTAL VALUE—DEDUCTION OF PRICE OF WATER.**—The proper measure of damages for such refusal is the difference between the rental value of plaintiff's land with the water and its rental value without it, deducting from the difference the lawful price of the water. (*Id.*)
6. **WATER COMPANIES—CONVEYANCE TO MEMBERS—PROPORTIONATE SHARE OF EXPENSE—DISINCORPORATION—SYSTEM OF NEW COMPANY—CUSTOMARY RATES—RIGHTS OF OLD MEMBERS.**—Where a former water company had conveyed lands and water rights to its members, agreeing to supply the water subject to its rules and regulations, on condition of paying a proportionate share of the expense of maintaining its pipes, flumes, zanges and reservoirs, and after allowing them to become greatly out of repair had discontinued, and a large number of its members had formed a new stock company, which had at great expense rehabilitated and improved the system, and constructed new pipes—one who was only a member of the old company, and who had applied to the new company for delivery of his share of water by connection with a new pipe wholly constructed by it, which was granted on certain conditions, including payment of its customary rates, cannot, after

WATER AND WATER RIGHTS (Continued).

such connection and payment of such rates, insist upon delivery of the water under the former method of proportionate expense, without payment of the customary rates charged by the new company to all consumers of water. (*Beck v. Pasadena Lake Water Co.*, 50.)

7. **INJUNCTION SUIT—SEVERANCE OF CONNECTION WITH NEW PIPE—RIGHT TO CONNECT WITH OLD SYSTEM—FINDINGS—JUDGMENT WITHOUT INJURY—APPEAL.**—In an action by a member of the former company to enjoin the new company from severing connection with its pipe for nonpayment of its customary rates, where the facts found are such that, whatever may be the plaintiff's right to connect with the pipes and reservoirs of the former company, by paying his proportionate share of costs and expenses, he is not injured by a judgment against his right to receive water by connection with a new pipe constructed by the new company, without payment of its customary rates under a subsequent special contract for such payment, the judgment will be sustained upon appeal. (*Id.*)
8. **WATER RIGHTS—PRIOR AND SUBSEQUENT APPROPRIATIONS—EXTENT OF NECESSARY USE—FINDING AGAINST EVIDENCE.**—The evidence reviewed and held insufficient to support a finding that the whole of a stream to the extent of the capacity of the ditch of prior appropriators, while there is sufficient to fill it, and all that may flow in it in the irrigating season, is necessary for agricultural and domestic uses on their land, as against subsequent appropriators of the stream. [*McFarland, J.*, dissenting.] (*Senior v. Anderson*, 290.)
9. **RIPARIAN RIGHTS—CERTIFICATE OF PURCHASE—PRIOR APPROPRIATION NOT AIDED.**—Riparian rights can only entitle the owner to a reasonable use of the water of the stream upon riparian lands; and if a prior appropriation of the stream made for the use of the same lands exceeded in quantity what was required for beneficial uses upon the lands, riparian rights subsequently acquired thereupon by a certificate of purchase by the prior appropriator cannot aid the rights of such appropriator, as against a subsequent appropriator of the waters of the stream. (*Id.*)
10. **RIGHTS OF LOWER SUBSEQUENT APPROPRIATOR.**—A lower subsequent appropriator is entitled to have all of the stream, except so much as has been antecedently acquired by beneficial use under a prior appropriation, flow down to his land, for the uses named in his notice of appropriation. (*Id.*)
11. **ADVERSE USE BY PRIOR APPROPRIATOR.**—The diversion of water through the ditch of a prior appropriator not necessary for a useful purpose cannot confer a right as against a subsequent appropriator, and after the subsequent appropriation, the application of more water to a beneficial use by the prior appropriator must mark the beginning of adverse use. (*Id.*)

WATER AND WATER RIGHTS (Continued).

12. **PROPOSED COMPROMISE—AUTHORITY OF PRESIDENT OF WATER COMPANY—EXECUTION OF COMPROMISE BY PLAINTIFFS—RIGHTS OF DEFENDANTS.**—A proposition of consolidation and compromise of the water rights of the plaintiffs and of a corporation under which the defendants claims, made by its president without authority or sanction of the corporation, is not binding upon and does not estop the defendants, though acted upon and executed on the part of the plaintiffs. But if it were shown that the president was authorized to make the proposition which was so acted upon, or if the adjustment was ratified by the water company, the defendants might be compelled to perform the agreement. (Id.)
13. **RIPARIAN RIGHTS—STREAM AND BRANCH—DIFFERENCE OF LEVEL—MAINTENANCE OF DAM—FINDINGS OUTSIDE OF ISSUES.**—In an action involving the relative riparian rights of the plaintiffs upon a main stream, and of the defendants upon a branch thereof, where the complaint alleged that the bed of the branch was three feet above the level of the stream, that defendants had lowered its bed to plaintiff's injury, and plaintiffs had restored the original level by means of a dam, for the threatened destruction of which an injunction was sought, and where the answer merely took issue upon the allegations of the complaint, findings as to the size, contour, roughness, grade, and velocity of the river, and as to the specific quantity of water plaintiffs are entitled to have flow past the head of the branch, are outside of the issues, and cannot support a judgment based thereon. (Wallace v. Farmers' Ditch Co., 578.)
14. **APPEAL—UNCERTAINTY OF FINDINGS AND JUDGMENT—MODIFICATION—REVERSAL—PARTIES NOT APPEALING.**—Upon appeal from such judgment, where the findings outside of the issues and the judgment leave it uncertain at what height the dam may be maintained, and appear to indicate that it may be maintained at different heights, so as to secure the flow of a specified quantity of water to the plaintiffs, the judgment cannot be modified, but must be reversed as to the appellant, though it will not be disturbed as to the rights of parties not appealing. (Id.)
15. **RIGHTS OF RIPARIAN OWNERS UPON BRANCH.**—The riparian owners of the land upon the branch of the stream are entitled to have their rights protected against the maintenance of the dam at its head at a greater height than is justly warranted. (Id.)
16. **EVIDENCE—IMMATERIAL DIVERSIONS.**—Evidence of diversions above and below the head of the branch is not germane or material to the issue as to the right to maintain the dam at the head of the branch, and is properly rejected. (Id.)
17. **NATURAL FILLING OF BED OF STREAM.**—Evidence of the natural filling of the bed of the main stream was properly confined to the head of the branch stream, and evidence of such filling at points

WATER AND WATER RIGHTS (Continued).

three miles above and a mile and a quarter below the head of the branch was properly rejected. (Id.)

18. **WATER RIGHTS—UNCERTAIN JUDGMENT—REVERSAL UPON APPEAL.** A judgment in an action involving the rights of the parties in the flow of the waters of a creek, which, when its parts are read together and considered as a whole, is unsatisfactory and uncertain, and not sufficiently explicit to determine all the rights of the parties, and the amount of water to which each is entitled, must be reversed upon appeal. (Steinberger v. Meyer, 156.)

19. **RIPARIAN RIGHTS—INJUNCTION—DIVERSION OF FLOOD WATERS BY WATER COMPANY.**—A riparian proprietor is not entitled to an injunction to restrain a water company engaged in supplying water for public use from diverting the surplus storm or flood waters of a creek, which will not prevent the flowing over his land of the ordinary waters of the stream, nor in any way damage his land nor interfere with the rights appurtenant thereto. (Fifield v. Spring Valley Water Works, 552.)

See Irrigation District.

WAY.

1. **PRIVATE WAY—ACTION TO REMOVE GATE—FORMER JUDGMENT—ACTION TO ABATE PRIVATE NUISANCE.**—A former judgment for the defendant in an action to abate as a private nuisance alleged to be specially injurious to the plaintiff a gate placed across a private road at its connection with the public highway, is a bar to another action by the same plaintiff against the same defendant to have it adjudged that plaintiff is entitled to the free use of the same private road, and that the gate be adjudged an obstruction, and that the defendant be compelled to remove it, and be restrained from placing or maintaining across said road a gate or other obstruction, where it appears that substantially the same issues were involved in both actions, and both depend upon the same evidence. (Phelan v. Quinn, 374.)
2. **DEDICATION OF PRIVATE ROAD NOT INVOLVED—ABATEMENT OF NUISANCE IN PRIVATE WAY.**—It was not necessary for the plaintiff, in order to maintain the former action, to prove that the private road had been dedicated to the public and had been used and accepted by the public as a highway, and that plaintiff was specially injured by the obstructions in a manner different from the public at large. A nuisance in a private way may be enjoined or abated under section 731 of the Code of Civil Procedure. (Id.)
3. **DISPUTE OF RIGHT TO MAINTAIN GATE.**—Where the real contention in both actions related to the right of the defendant to maintain the gate in question, and did not relate to the character of the road in which it was maintained, and that contention was tried in both cases on the same facts and the same evidence,

WAY (Continued).

the judgment in the first case on that subject matter is conclusive in the second case. (Id.)

4. **NATURE OF ACTION—CHANGE OF NAME OF THING OBJECTED TO.**—The nature of an action cannot be changed by changing the name of the thing objected to; and an action to abate a gate as a nuisance is of the same nature with an action to remove the same gate as an obstruction. (Id.)
5. **SUFFICIENCY OF WIDTH OF GATE—ISSUE NOT CONCLUDED—NEW TRIAL.**—Where there has been no previous adjudication of the question whether the gate is wide enough for the convenient use of the plaintiff's property as farming land, and there was evidence that it may be made wider, and that it is not wide enough to admit a self-binder harvesting machine, though wide enough for ordinary travel, a new trial will be granted to determine the question whether a wider gate should be provided. (Id.)
6. **QUIETING TITLE—RIGHT OF WAY ALONG OLD ROAD—DESCRIPTION IN DEED—ACTS OF PARTIES—LOCATION OF ROAD.**—In an action to quiet title to a right of way eighteen feet in width, along an old road, conveyed by deed from the defendant to the plaintiff, the court may consider the acts of the parties in adopting the description contained in the deed, the building of fences by the defendant so as to give a road eighteen feet in width, and the use and repair by the plaintiff of the road so fenced, for a period of ten years, as indicating the correct location of the road. (Schmidt v. Klotz, 223.)
7. **RECOVERY OF COSTS—RIGHT OF WAY APPURTENANT TO LAND NOT ADMITTED.**—Where the plaintiff sought to quiet title to a right of way conveyed by deed of the defendant as "appurtenant to plaintiff's land," and defendant claimed an estate in the right of way, and merely admitted the right of plaintiff to travel over so much of said land as lies between the fences erected by the defendant, such answer is not to be construed as an admission or disclaimer of the appurtenant right of way claimed by plaintiff, and upon recovery of judgment by the plaintiff upon a finding of his ownership of such right of way, he is entitled to recover costs, as a matter of course, and a direction that each party pay his own costs is erroneous. (Id.)
8. **JUDGMENT INCLUDING MATTER NOT IN ISSUE—REMOVAL OF LIMBS OF FRUIT TREES—MODIFICATION UPON APPEAL.**—A judgment including matter not in issue, providing that limbs of fruit trees growing on plaintiff's land, not included in the right of way, may be removed by the defendant so far as they may interfere with passage over the road, in regard to which interference no evidence was introduced, is erroneous, and should be modified upon appeal by striking out such matter therefrom. (Id.)

WILLS.

1. **CONTEST OF PROBATE—UN SOUND MIND OF TESTATOR—INSANE DELUSIONS—SHOWING REQUIRED.**—In order to sustain a contest of the probate of a will for the unsoundness of the mind of the testator, by reason of insane delusions, it must be shown that the delusions were not merely temporary hallucinations, or unfounded dislikes or antipathies, or false opinions and beliefs, but were spontaneous and firmly fixed beliefs of a diseased mind, which no argument or evidence could convince to the contrary, and which a rational mind would not entertain, and also that the insane delusions operated to cause the production of the will under attack. (Estate of Kendrick, 360.)
2. **VERDICT AGAINST EVIDENCE.**—The evidence reviewed, and held to be insufficient to sustain the verdict of the jury that at the time of the making of the will the testator lacked testamentary capacity by reason of unsoundness of mind. [McFarland, J., dissenting.] (Id.)
3. **UNDUE INFLUENCE—CHANGE OF WILL—SUPPORT OF VERDICT.**—A verdict that the will was obtained by undue influence is supported by evidence showing that it was changed in favor of a niece who was well to do, from a previous will in favor of a sister who was poor and had a large family, and that the testatrix, after having suffered a paralytic stroke, sent for the niece to induce her to support the previous will, and to make her a present in that view, and that the niece, after learning of the will, spoke against the sister to the testatrix, and had repeated and long conversations with her just before the will was changed, after which conversations the testatrix, while in an enfeebled condition, put herself in the hands of the niece to be controlled by her in the change of the will. (Id.)
4. **ISSUE OF FRAUD NOT SUBMITTED—MISLEADING INSTRUCTION.**—Where the only issues submitted to the jury were insanity and undue influence, an instruction upon the question of fraud, which the court had refused to submit to the jury, was confusing and misleading. (Id.)
5. **ERRONEOUS INSTRUCTIONS—INSANE DELUSIONS—DEFINITION—CONSEQUENCES.**—Instructions on the subject of insane delusions, which omit from the definition thereof the element that it must be adhered to against reason and evidence, and which omit from the declared consequences thereof in vitiating the will the important qualification that the jury must find that the particular will in question was caused by, or was the product of, one or more insane delusions, are erroneous. (Id.)
6. **"INSANE PREJUDICE"—MISLEADING INSTRUCTION.**—An instruction which predicates unsoundness of mind of the testatrix upon the possession of an "insane prejudice" which influenced her will in the disposition of her property, is confusing and misleading in not using the recognized term "insane delusion," which has a well-defined and exact meaning. (Id.)

WILLS (Continued).

7. **UNDUE INFLUENCE—PROOF—DEFINITION—IMPROPER INSTRUCTION.**—An instruction upon the subject of undue influence, which is argumentative and which purports to enumerate circumstances proving undue influence, which may merely tend to show undue influence, but which are in nowise conclusive thereof, and which declares it not possible with exactness to define or describe undue influence except in general and approximate terms, and seems to leave to the jury the determination as to what may constitute undue influence, is erroneous. (Id.)
8. **CONTEST OF PROBATE—PLEADING—INFERENTIAL AVERMENT OF HEIRSHIP—ABSENCE OF DEMURRER.**—Upon the contest of the probate of a will, the description of the contestants as “brother and sister and heirs at law” of the deceased, in the introducing sentence of their opposition to the probate, without any direct averment of their heirship, constitutes an inferential averment thereof, which, in the absence of a demurrer to the opposition, will be held sufficient after judgment. (Estate of Behrens, 416.)
9. **SUPPORT OF FINDING OF HEIRSHIP—SUFFICIENCY OF EVIDENCE—ABSENCE OF SPECIFICATION.**—Where there was slight evidence that the contestants were the next of kin of the deceased, in addition to an averment thereof in the petition for probate (to which there was a general denial), and the hearing of the contest seems to have proceeded upon the assumption of such kinship, a finding that the contestants were the next of kin of the deceased is sufficiently supported to make the rule applicable that the finding must be deemed conclusive, in the absence of a specification of the insufficiency of the evidence to justify that particular finding. (Id.)
10. **CONTEST OF OLOGRAPHIC WILL—GENUINENESS OF DATE—FINDING—CONFLICTING EVIDENCE—APPEAL.**—Upon a contest of the probate of an olographic will, involving an issue as to the genuineness of the handwriting of its date, a finding upon conflicting evidence that the date was not in the handwriting of the deceased, and that the instrument proposed for probate was not the will of the deceased, cannot be disturbed upon appeal. (Id.)
11. **OPINION OF JUDGE—COMPARISON OF HANDWRITING—ORAL EVIDENCE—RECORD—REASONS FOR FINDINGS.**—Statements in the opinion of the judge, showing that he was strongly influenced in his conclusions by the comparison of the handwriting of the deceased, does not show that he improperly usurped the functions of an expert or that he disregarded the oral evidence. His opinion forms no part of the record, and his reasons for correct findings of fact are immaterial. (Id.)

See Estates of Deceased Persons.

WITNESS.

1. **PAYMENT OF WITNESS IN CRIMINAL CASE—VOID ORDER FOR WARRANT—NUNC PRO TUNC ORDER BY SUCCEEDING JUDGE.**—An order of a superior judge not made by the court nor entered in the minutes of the court, directing the county auditor to draw his warrant for a specified sum "in favor of the above-named witness," no name being inserted in the order, is void and ineffectual for any purpose. It cannot authorize the auditor to draw his warrant, nor constitute the basis of an order *nunc pro tunc* made by a succeeding judge and entered upon the minutes of the court in favor of a witness named who had attended in a criminal case. (Murphy v. Madden, 674.)
2. **MANDAMUS TO TREASURER.**—*Mandamus* will not lie to the county treasurer to compel payment of a warrant drawn by the auditor under such void order. (Id.)
3. **CONSTRUCTION OF PENAL CODE—EXPENSES OF POOR WITNESSES.**—Section 1329 of the Penal Code does not provide a mode in which witnesses in criminal cases generally are to be paid; but relates only to the special case of the expenses of poor witnesses attending from outside the county, and simply furnishes the court with the means of procuring their attendance. (Id.)
4. **FEES IN CRIMINAL CASES—ACT OF 1895—MODE OF PAYMENT—PRESENTATION TO SUPERVISORS.**—The fee bill of 1895, supposing it to have any application to a witness for whom an order is made under section 329 of the Penal Code, does not provide a mode for enforcing the fees of witnesses attending in criminal cases; and if they constitute a valid charge against the county, which is not determined, they are to be submitted to the board of supervisors as other claims against the county are submitted. (Id.) 9

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130 Cal. 1-10. PEOPLE v. O'BRIEN.

Instruction Relating to Comparative Weight or relative value of circumstantial evidence. and direct evidence of eye witnesses, charges as to matter of fact and is erroneous, p. 8.

Approved in Estate of Blake, 136 Cal. 311, in will contest, where mental condition of deceased was at issue, instruction discrediting testimony of medical experts given on hypothetical questions, as unsatisfactory and unreliable, and giving reasons why, in judge's opinion, it was such, is erroneous.

130 Cal. 16-20. BEHLOW v. SOUTHERN PAC. R CO.

Condition Subsequent in Deed to railroad, that if land is not used for railroad purposes only, it is to revert to grantors, is not broken by irregular use of land for such purposes, p. 19.

Approved in Reclamation District v. Van Loben Sels, 145 Cal. 184. where deed to reclamation district provides that if land ceased to be used for reclamation purposes it shall recover to grantor, and evidence shows that work of reclamation not ended and use still made of land by reclamation district, there is no forfeiture. See 79 Am. St. Rep. 758, note.

Provision in Deed by which railway agrees, as further consideration of grant, to place two stations at location to be selected by grantor, at which all trains must stop, is merely a personal covenant on part of grantee, pp. 19, 20.

See 79 Am. St. Rep. 759, note.

130 Cal. 50-58. BECK v. PASADENA LAKE V. L. & W. CO.

Miscellaneous.—Roberts v. Krafts, 141 Cal. 27, as to what constitutes a development of water.

130 Cal. 58-60. WILLIAMS v. LONG, 80 Am. St. Rep. 68.

Fact that Respondent died before expiration of time for appeal, and

administrator not appointed till after expiration of time, upon whom notice of appeal served, does not preclude dismissal, pp. 59, 60.

Approved in *Estate of Turner*, 139 Cal. 86, following rule.

Miscellaneous.—*Williams v. Long*, 139 Cal. 188, reciting history of litigation.

130 Cal. 82-96. **PEOPLE v. CURRY.**

Instance of Statute, title of which does not express subject matter of act, p. 91.

Approved in *Pratt v. Browne*, 135 Cal. 653, salary of official reporters is not included in or germane to title of act to create "uniform system of county government" (Stats. 1897, p. 546).

130 Cal. 96-99. **HOBAN v. RYAN.**

Justice Court has no Jurisdiction of action for unlawful detainer where rent is ten dollars per month and total rent aggregates one hundred and twenty dollars, and complaint asks treble damages, pp. 97, 98.

Distinguished in *Nolan v. Hentig*, 138 Cal. 283, objection that justice's court has no jurisdiction of action for unlawful detainer claiming twenty-five dollars rent due, fifty dollars damages for waste, and that damages be trebled, cannot be urged, where cause on appeal in superior court was tried on merits without objection to jurisdiction.

130 Cal. 105-109. **MONO COUNTY v. FLANAGAN.**

Only Where Evidence adduced upon challenge of juror for actual bias plainly shows such bias, is action of court disallowing challenge reviewable on appeal, p. 108.

Approved in *People v. Chutnacut*, 141 Cal. 684, where juror was challenged for actual bias against defendant as an Indian, but evidence in record shows to the contrary, challenge was properly denied.

130 Cal. 110-113. **MOORE v. MOORE.**

Contract Between Father who was entitled to make homestead entry and son, who had by fraud made entry in own name, that son should proceed and make proofs and convey title to father, is void, pp. 111, 112.

Approved in *Pacific Livestock Co. v. Gentry*, 38 Or. 293, contract between a corporation and one of its employees by which latter is to settle on government land in guise of homesteader, in pursuance of agreement to convey to corporation whatever title he may acquire, is void.

130 Cal. 116-124. GRAND GROVE ETC. OF CAL. v. GARIBALDI GROVE ETC., 80 Am. St. Rep. 80.

An Unincorporated Association organized for mutual benefit is mere aggregate of individuals, p. 119.

Distinguished in *Estate of Winchester*, 133 Cal. 278, an unincorporated association formed for charitable object composed of known members and governed by constitution and by-laws, and having officers, may take by bequest, and if between death of testator and distribution of estate society incorporates with same members and for same object, distribution may be made to corporation.

Record may be Amended in supreme court, p. 123.

Distinguished in *Baker v. Borello*, 131 Cal. 618, bill of exceptions upon which motion for new trial was had and which constitutes record on appeal therefrom cannot be amended in supreme court or in superior court pending appeal.

130 Cal. 124-127. SUTTER COUNTY v. McGRIFF.

Prima Facie Case for condemnation of land for highway shown by proof of presentation of petition to supervisors with bond, report of viewers and its approval, assessment of damages, setting apart of award to defendant, his refusal to accept and order to commence suit, p. 126.

Approved in *Sutter Co. v. Tisdale*, 136 Cal. 476, following rule.

130 Cal. 156-158. STEINBERGER v. MEYER.

Judgment in Action involving rights to flow of waters in creek, which, when its parts are read together and considered as a whole, is uncertain, is not sufficiently explicit, to determine amount of water to which each is entitled, is erroneous, pp. 157, 158.

Approved in *Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 600, court in action to enjoin diversion of water and to recover damages for wrongful diversion, must decide upon amount of water diverted, and also determine amount of damages thereby sustained by plaintiff.

130 Cal. 159-168. PEOPLE v. BENC.

Where Prosecutrix in Rape Case is under age of consent, her testimony to forcible rape by defendant, and that no one else had had intercourse with her, cannot be impeached by evidence that she led an unchaste life, p. 162.

Approved in *People v. Harlan*, 133 Cal. 20, prosecutrix in rape case cannot be asked upon cross-examination whether she visited a house of ill-repute with knowledge of its character, nor can the character of house be proved by others.

Court has Discretion to allow district attorney to reopen case of prosecution for further testimony, p. 165.

Approved in *People v. Majoine*, 144 Cal. 304, where appellant with another accused of same crime was convicted of burglary, it was in the discretion of the court to allow a witness who had testified to conversation with such other defendant to testify on redirect examination as to another conversation with him.

Instructions Relating to Mode of Exercising Powers of jury in determining credit of witness, which are not untrue or erroneous except as they may infringe province of jury are harmless where they merely tell jury what they knew, p. 166.

Approved in *People v. Wong Bin*, 139 Cal. 65, following rule.

130 Cal. 177-180. HOLLOWAY v. PASADENA ETC. RY. CO.

If Evidence on Part of Plaintiff was such that jury would have right to infer negligence therefrom, court did not have right to usurp functions of jury and take case from them, p. 179.

Approved in *Merrifield v. Maryland etc. Co.*, 143 Cal. 57, applying rule in action for injuries to employee; *Mansfield v. Eagle Box etc. Co.*, 136 Cal. 626, it is negligence for an employer to put an inexperienced servant at dangerous work outside scope of ordinary employment without instructing him as to safest method of doing work and warning him of liability of special danger; *Santa Ana v. Gildmacher*, 133 Cal. 398, in action to condemn strip of land for sewer question of necessity of condemnation is one of fact for the jury.

It is not Contributory Negligence, as matter of law, for plaintiff to sit upon platform of crowded car with feet on step from which position he was jerked to ground, pp. 179, 180.

Approved in *Seller v. Market St. Ry. Co.*, 139 Cal. 273, following rule.

130 Cal. 181-183. BARTLETT v. MACKEY.

Appeal from Interlocutory Judgment in partition taken more than sixty days after entry of interlocutory judgment is too late, p. 181.

Approved in *Dore v. Klumpke*, 140 Cal. 356, following rule.

130 Cal. 183-187. KERR v. SUPERIOR COURT.

Mandamus will not lie to compel action which would be fruitless, p. 185.

Distinguished in *De la Beckwith v. Superior Court*, 146 Cal. 499, mandamus lies to compel court to hear motion to bring in parties.

Mandamus does not lie to compel superior court to issue citation on accusation under Penal Code, section 772, against irrigation district director, pp. 184, 186.

Distinguished in *Cahill v. Superior Court*, 145 Cal. 45, granting mandamus to compel court to hear motion to vacate order setting apart homestead.

130 Cal. 190-194. **BLACK v. HILLIKER.**

Failure of Moving Party to give notice of settlement of statement on motion for new trial and amendments thereto, or to give notice of adoption or rejection of amendments, operates as allowance, p. 192.

Approved in *Gay v. Torrance*, 143 Cal. 18, mandamus judge to settle bill of exceptions where four days after last of agreed meetings moving party attached written allowance of all amendments, and they were presented to clerk for judge on same day and judge fixed time for settlement on notice and upon objection by adverse party refused to settle bill.

Findings Based on Conflicting Evidence cannot be reviewed on appeal, p. 192.

Approved in *Hunt v. Hammel*, 142 Cal. 458, where there is evidence tending to sustain all findings in conversion, findings will not be disturbed on appeal.

In Claim and Delivery damages are not recoverable where property returned to defendant and defendant recovers judgment, p. 192.

Approved in *Erreca v. Meyer*, 142 Cal. 310, judgment for value of property in claim and delivery without alternative for recovery of possession may be had where it is shown to trial court that judgment for its delivery would be unavailing.

130 Cal. 200-206. **GAY v. TORRANCE.**

Irregularities in proceedings of court as ground for new trial includes only matters which cannot be fully presented by exceptions taken during trial and which must appear by affidavit, p. 205.

Approved in *Gay v. Torrance*, 145 Cal. 149, trial court is not justified in striking out from bill of exceptions competent affidavits served on motion for new trial.

130 Cal. 207-222. **HADLEY v. DAGUE.**

Warrant, Assessment and Diagram, together with certificate of engineer, and affidavit of demand and nonpayment are prima facie evidence of regularity of street assessment, p. 215.

Approved in *Belser v. Allman*, 134 Cal. 401, following rule; *City St. Imp. Co. v. Laird*, 138 Cal. 31, corporate seal is not essential to validity of contract for street improvement made by corporation.

Street Improvement Act apportioning expense of street improvement according to frontage, is valid, pp. 217, 218.

Approved in *German Sav. etc. Soc. v. Ramish*, 138 Cal. 125, 129, *Chapman v. Ames*, 135 Cal. 246, *Belser v. Allman*, 134 Cal. 400, *San Francisco Pav. Co. v. Bates*, 134 Cal. 40, *Banaz v. Smith*, 133 Cal. 105, and *King v. Portland*, 38 Or. 428, all following rule; *Kelly v. Chadwick*, 104 La. 733, upholding New Orleans ordinance providing for assessment for street pavement according to frontage.

130 Cal. 223-226. SCHMIDT v. KLOTZ.

Costs are Allowed, of Course, to plaintiff upon judgment in his favor in action which involves title or possession to realty, p. 224.

Approved in *Sierra Union etc. Co. v. Wolff*, 144 Cal. 433, applying rule in action to quiet title.

130 Cal. 226-229. ALAMEDA MACADAMIZING CO. v. PRINGLE, 80 Am. St. Rep. 124.

Ordinance Requiring Street Contractor to give bond guaranteeing work for one year from injury by ordinary use is unauthorized and makes contract and assessment void, pp. 227, 228.

Approved in *Blockman v. Spreckels*, 135 Cal. 665, contract for street work providing that "all loss or damage arising from nature of work to be done under these specifications shall be sustained by contractor," is void; *Shank v. Smith*, 157 Ind. 409, contract for street improvement conditioned that contractor should make all repairs for seven years that became necessary as result of unskilled construction or unsuitable material, retaining certain per cent of contract price as guaranty fund, is not invalid; *Young v. Tacoma*, 31 Wash. 160, contract requiring street contractor to give bond conditioned that he would keep work in thorough repair from injury by traffic, decomposition and decay for five years is not as matter of law provision for future repairs, but is for jury.

130 Cal. 230-236. HAYS v. WINDSOR.

Counsel Fees are not recoverable by prevailing party in replevin, as damages, for conversion of property where no other expense was incurred in pursuit of property, p. 235.

Approved in *Pacific Postal Tel. etc. Co. v. Bank of Palo Alto*, 109 Fed. 378, in action against telegraph company for damages sustained through fraudulent act of its agent by which plaintiff was induced to pay money to third person, attorneys' fees expended in recovering money paid to such third person are not recoverable.

130 Cal. 241-245. BRILL v. DE TURK.

Owner of building who did not avail himself of valid defense to foreclosure of liens filed in excess of amount due contractor, cannot recover excess on contractor's bond, p. 244.

Approved in *Stimson v. Dunham etc. Co.*, 146 Cal. 284, where material-men and laborers had served notice on owners of their claims against contractor which aggregated more than contract price, owner cannot be held beyond contract price.

130 Cal. 245-258. STATE LOAN ETC. CO. v. COCHRAN.

Where Creditor Forbears to Sue upon written request of debtor, debtor will be estopped to plead statute running of which is suspended during time of forbearance as requested, pp. 251, 252.

Approved in *Foster v. Bowles*, 138 Cal. 351, it is not necessary that trustees should promise to pay debt secured by mortgage in order to establish new date under statute as acknowledgment in writing of existence of mortgage is sufficient.

130 Cal. 258-268. FAULKNER v. FIRST NAT. BANK.

Where Delivery cannot be had, defendant in detinue is not prejudiced by judgment for value without any alternative, p. 266.

Approved in *Richards v. Morey*, 133 Cal. 440, fact that at time of commencement of action to recover possession of house which had been wrongfully removed by defendant onto land of another, house was occupied by defendant, does not give him possession thereof necessary to sustain action.

Court may Grant any Relief consistent with case made by complaint and embraced within issue, p. 267.

Approved in *Booker v. Aitken*, 140 Cal. 472, action by executor to enforce trust in real property in which sole relief sought is to avoid deed from decedent to defendant for fraud, is real action, and non-resident defendants are not entitled to change of venue to place of their residence.

130 Cal. 272-274. DUKE v. HUNTINGTON.

Stockholder is Liable for proportion of debts of corporation not only for stock standing in his name on books, but also for all stock owned by him which stands in name of another, p. 274.

Approved in *Abbott v. Jack*, 136 Cal. 513, where stock-book shows issuance of certificate in name of wife sued as defendant on statutory liability and stood for three years on books in her name, she is liable as stockholder.

130 Cal. 278-282. LOS ANGELES v. HANCE. See *Hellmann v. Los Angeles*, 147 Cal. 656.

130 Cal. 288-290. NICOL v. SAN FRANCISCO.

In Absence of Showing of Abuse of Discretion appellate court will not disturb dismissal for failure to prosecute, p. 289.

Approved in *Martin v. San Francisco*, 131 Cal. 576, following rule.

130 Cal. 290-303. **SENIOR v. ANDERSON.**

Miscellaneous.—Senior v. Anderson, 138 Cal. 718, reciting history of litigation.

130 Cal. 309-316. **CROW v. SAN JOAQUIN ETC. CO.**

For Refusal of Irrigation Company to supply water at established rates, loss of profits on unplanted crop which would have been planted if water had been obtained, is too remote to be allowed as damages, p. 314.

Approved in Barnes v. Berendes, 139 Cal. 36, in action to abate nuisance consisting of wall of house overhanging plaintiff's lot, so as to prevent erection of building thereon, damages for loss of profits of plaintiff's business between time of laying foundation of building and completion of temporary building in rear in which business was carried on, are not allowed.

130 Cal. 316-322. **BYRNE v. McGRATH**, 80 Am. St. Rep. 127.

Where trust Fund held by deceased person is susceptible of identification, trust may be enforced without presentation of claim against estate, p. 318.

Approved in Estate of Dutard, 147 Cal. 256, following rule; Elizalde v. Elizalde, 137 Cal. 642, upon death of trustee leaving trust fund in his possession, presentation of claim against estate is not required in order that beneficiary recover trust fund from administrator.

130 Cal. 322-333. **PARKER v. OTIS**, 92 Am. St. Rep. 56.

An Undisclosed Principal may recover money paid by his agent without disclosing agency, upon contract for purchase and sale of mining stock on margin in violation of constitution, article 4, section 26, p. 326.

Approved in Stillwell v. Cutter, 146 Cal. 660, applying rule to recovery of money paid brokers for purchase of stock on margin; Otis v. Parker, 187 U. S. 607, California constitution, article 4, section 26, is not contrary to first section of fourteenth amendment to federal constitution.

130 Cal. 342-345. **NEWLOVE v. POND.**

It is Legally Presumed that ownership specifically found on day named, in absence of any finding to contrary, continues up to time of conversion, p. 344.

Approved in Hunt v. Hammel, 142 Cal. 458, in action for conversion of personalty and averment that plaintiff was owner and in possession of property on day of taking is sufficient allegation of ownership at commencement of action.

130 Cal. 345-351. **CURTAIN v. SALMON RIVER ETC. MIN. CO.**, 80 Am. St. Rep. 132.

Quorum of Directors of Corporation cannot be had where interested director's vote is necessary to make majority, pp. 348, 349.

Approved in *Bassett v. Fairchild*, 132 Cal. 647, 651, at meeting of directors of corporation, legal quorum cannot be formed by presence of interested director so as to authorize or ratify any action taken in his favor as general manager.

Meeting of Corporate Directors at which there is bare majority cannot authorize execution of mortgage to one of directors present, pp. 349, 350.

Approved in *Curtain v. Salmon R. etc. Co.*, 141 Cal. 310, mortgage of corporation can only be authorized or ratified in writing in conformity with law; *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 367, where president of corporation bought its notes and caused corporation, by himself as president, to become indorser thereof to himself individually, without knowledge or approval of corporation, he cannot sue on endorsement; *Parsons v. Tacoma Smelting etc. Co.*, 25 Wash. 498, action of majority of board of trustees is voidable upon complaint of stockholder, where note of trustee interested adversely to corporation was necessary to affect such action.

Under Act of 1880, stockholders of mining corporation cannot ratify attempted mortgage of mining property of corporation which is invalid for want of authorization of directors, p. 350.

Approved in *Williams v. Gaylord*, 186 U. S. 164, following rule.

130 Cal. 352-359. **ODELL v. MOSS.**

Deed from Beneficiary to Trustee without adequate consideration is presumed invalid and constructively fraudulent, p. 358.

Approved in *Corporation of Latter Day Saints v. Watson*, 25 Utah, 52, dealings by spiritual advisor with one who is without independent advice and is about to die, by which adviser receives any advantage in the transaction between them will be set aside, whether benefit accrues to adviser or to some other who may become beneficiary through such influence; dissenting opinion in *Stringfellow v. Hanson*, 25 Utah, 500, majority holding undue influence sufficient to set aside deed not shown.

Limitations does not Begin to Run against beneficiary of continuing trust until repudiation of trust by trustee has been brought home to knowledge of beneficiary, p. 359.

Distinguished in *Barker v. Hurley*, 132 Cal. 29, where there was no express trust as to money and more than four years had elapsed after money was received and appropriated, and after land was purchased and occupied as homestead, without any recognition of trust, action to enforce trust is barred.

Miscellaneous.—*Odell v. Moss*, 137 Cal. 543, reciting history of litigation.

130 Cal. 360-373. ESTATE OF KENDRICK.

Insane Delusions sufficient to set aside will, defined, pp. 364, 365, 370. Approved in *Estate of Calef*, 130 Cal. 675, 678, following rule.

130 Cal. 380-384. IN RE CAMPBELL.

Prima Facie Presumption is that parent is competent and court cannot appoint another as guardian, unless it finds the contrary, p. 383.

Approved in *Guardianship of Van Loan*, 142 Cal. 426, where letters of guardianship were granted to grandmother without knowledge or consent of mother, upon showing by mother of right to custody, and that proceeding by which she was deprived of custody was taken against her by surprise, she is entitled to order vacating appointment notwithstanding conflicting affidavits as to her fitness; *Guardianship of Salter*, 142 Cal. 413, where father is competent to act as guardian of minor, he is entitled to letters to exclusion of grandmother. Distinguished in *In re Lundberg*, 143 Cal. 408, where mother of child, as its only surviving parent, has abandoned its custody, superior court on notice to person having custody of child may appoint guardian for its person which appointment mother cannot attack upon habeas corpus.

130 Cal. 392-395. FREIERMUTH v. STEIGLEMAN, 80 Am. St. Rep. 138.

Community Property on which homestead has been declared cannot be mortgaged by wife to husband to secure debt from her to him, by mortgage in which she alone joins, pp. 394, 395.

Approved in *Lange v. Geiser*, 138 Cal. 684, mortgage on homestead by wife alone is not affected by subsequent conveyance of homestead by husband to wife, and title thus acquired by wife subsequent to mortgage cannot inure to mortgagee as security; *Payne v. Cummings*, 146 Cal. 431, *arguendo*.

130 Cal. 401-409. KENT v. SAN FRANCISCO SAVINGS UNION. S. C.
Kent v. Williams, 146 Cal. 5.

130 Cal. 416-422. ESTATE OF BEHRENS.

Query whether abbreviation "Feb. 12, '98," in holographic will constitutes a date, p. 418.

Approved in *Estate of Lakemeyer*, 135 Cal. 30, holographic will, wholly written, dated and signed by testator and dated "New York, Nov. 22, '97," is not vitiated by the abbreviations in date.

130 Cal. 422-426. BUTLER v. GOSLING.

Deed of Ranch reserving and saving from operation of conveyance four square miles to be selected and located by grantors has effect of exception of the land reserved, p. 425.

Approved in *Sears v. Ackerman*, 138 Cal. 586, deed of land "with exception of timber of said land which I reserve for my own use" leaves fee simple title to timber in grantor.

130 Cal. 431-434. PHILLIPS v. SANGER LUMBER CO.

Note of Corporation executed in its name by president for valuable consideration to another corporation of which he is also president, though not authorized by directors, may be ratified by corporation, p. 433.

Approved in *Curtain v. Salmon R. etc. Co.*, 141 Cal. 311, 312, where transaction of note and mortgage which was invalid because not authorized by directors, was fully entered on books of corporation and it retained benefits of loan, and never attempted to rescind it, ratified the note and is estopped to dispute enforcement of note.

Ratification of Unauthorized Loan by president of corporation, is shown if transaction is entered on books, and corporation for seven months after notice takes no steps to disaffirm note, and retains consideration for which it was received, pp. 433, 434.

Approved in *Abbott v. Jack*, 136 Cal. 512, authority of bank cashier to issue certificate of deposit may be shown by custom of bank, or of its cashier, and by his semi-annual statements, as well as by the by-laws of bank expressly conferring on him authority to issue such certificates; *Mills v. Boyle Mining Co.*, 132 Cal. 98, retention of consideration of note by corporation, with full knowledge of all parties interested, operates as ratification of authority of agents who executed the note. Distinguished in *Pacific Vinegar etc. Works v. Smith*, 145 Cal. 368, ratification not shown though secretary joined with president in making contracts where all facts cancelled from directors, and without knowledge of directors corporate name affixed to notes.

When President of Corporation has power to execute notes in its name, note so executed by him for valuable consideration moving to corporation, in transaction in which he has interest adverse to it, is merely voidable, pp. 433, 434.

Approved in *Schnittger v. Old Home etc. Min. Co.*, 144 Cal. 607, upholding loan by two directors to corporation where note and mortgage were authorized by vote of majority of disinterested directors.

130 Cal. 442-448. PEOPLE v. PACIFIC IMP. CO.

Where Special and General Statute treat of same subject, special act

controls as to its special provisions and will not be deemed repealed by implication, if general statute is not irreconcilably inconsistent, p. 448.

Approved in *Santa Cruz R. R. Co. v. Lyons*, 133 Cal. 116, repeal of 1897 to Code of Civil Procedure, section 1191, does not affect lien of real owner.

130 Cal. 449-455. **PEOPLE v. RUSHING**, 80 Am. St. Rep. 141.

Presumption is that discretion of court in denying new trial for newly discovered evidence was properly exercised, p. 455.

Approved in *People v. Warren*, 130 Cal. 685, upholding refusal of new trial for newly discovered evidence in prosecution for larceny when showing of diligence was not sufficient.

130 Cal. 455-459. **FARMERS' EXCHANGE BANK v. PURDY**.

Assignee in Insolvency of estate of insolvent mortgagor merely represents his creditors and is not subsequent purchaser for value, pp. 457, 458.

Approved in *Perkins v. Maier & Z. Brewery*, 133 Cal. 498, where chattel mortgage was made more than one month prior to filing of insolvency petition, and was made in good faith and for value, assignee cannot sue for conversion by purchaser under foreclosure sale.

An Unacknowledged and Unrecorded Mortgage is valid between parties, and also as against subsequent assignee in insolvency of mortgagor, if it was not executed in violation of Insolvency Act, p. 458.

Approved in *Payne v. Morey*, 144 Cal. 133, mortgage by grantee in deed absolute, to secure future services to one who had no knowledge of unrecorded defeasance, prevails against defeasance; *Talcott v. Herbert*, 143 Cal. 7, chattel mortgage properly verified and recorded without acknowledgment is not void as to purchaser with notice.

130 Cal. 459-467. **AMERICAN TYPE FOUNDERS CO. v. PACKER**.

Specifications of Insufficiency of Evidence to sustain findings are sufficient if they enable counsel to determine what evidence should be put in statement and enable judge to strike out redundant and useless matter, p. 461.

Approved in *Gwin v. Calegaris*, 139 Cal. 391, *Pendola v. Ramm*, 138 Cal. 521, *Laidlaw v. Pacific Bank*, 137 Cal. 398, and *Matthews v. Ormerd*, 134 Cal. 87, all following rule; *Jones v. Goldtree Bros. Co.*, 142 Cal. 387, on order granting new trial, specifications of statement as to insufficiency of evidence are sufficient when they were not objected to when statement settled, and it contained all of the evidence; *Bell v. Staacke*, 141 Cal. 192, where probative facts are found by the court, specifications of insufficiency of the evidence to sustain any of such findings or any particular contained therein, are sufficient; *Swift v.*

Occidental Min. etc. Co., 141 Cal. 168, specifications of insufficiency of evidence to sustain findings, which clearly designate the findings and part of findings, which it is claimed the evidence does not justify, are not objectionable; Swett v. Gray, 141 Cal. 68, applying rule on appeal from judgment in civil action for seduction; Holmes v. Hoppe, 140 Cal. 213, in action for goods sold when defendant moved for new trial, specifications of insufficiency of evidence to justify decision that no settlement was made between defendant and agent of plaintiff's assignor, and that at time of assignment there was balance due, are sufficient where there was evidence from which court might have concluded that there was such settlement.

Where There is Reasonably Successful Effort to state particulars of insufficiency of evidence, appellate court will not refuse to consider case, pp. 461, 462.

Approved in Drathman v. Cohen, 139 Cal. 313, following rule; Stuart v. Lord, 138 Cal. 675, specification that decision is against law in that evidence shows that plaintiff had paid nothing on account of her work done and services rendered to defendant's intestate by plaintiff during years 1897 and 1898, is sufficient; Estate of Motz, 136 Cal. 561, applying rule in will contest as to fact of acknowledgment of will.

130 Cal. 478-480. ELLIS v. JEFFERDS.

Miscellaneous.—McPhail v. Jefferds, 130 Cal. 481.

130 Cal. 497. WOODHAM v. CLINE.

Defendant cannot Complain on appeal of absence of finding upon an affirmative defense set up in answer, if there is no evidence in record to sustain it, pp. 499, 500.

Approved in De Tolna v. De Tolna, 135 Cal. 578, applying rule in action for divorce.

130 Cal. 505-512. QUIRK v. ROONEY.

Decree of distribution to one heir made in ignorance of other heirs, concludes heirs not mentioned, p. 510.

Approved in Estate of Nolan, 145 Cal. 562, where family allowance was made to widow who was administratrix it cannot be attacked on settlement of her accounts as administratrix.

Doctrine of Res Adjudicata will not permit new action for enforcement of same title between same parties, merely because new evidence may be adduced in favor of it, pp. 510, 511.

Approved in Ivancovich v. Weilenman, 144 Cal. 762, final judgment in partition is conclusive as to any interest or lien not set forth, and which might have been litigated; Bingham v. Kearney, 136 Cal. 177, judgment in former action foreclosing contract of sale for default of

purchaser in payment of purchase money, is conclusive against right of purchaser to maintain action to rescind contract of sale and recover back purchase money paid; Estate of Harrington, 147 Cal. 129, where claim of widowhood determined against her on petition of alleged widow for homestead, she cannot claim as widow on distribution of estate.

130 Cal. 516-521. ASHTON v. HEGGERTY.

Miscellaneous.—Ashton v. Zeila Min. Co., 134 Cal. 409, reciting history of litigation; Ashton v. Zeila Min. Co., 134 Cal. 412, though assignees of stock should have been made parties to action by executors to recover dividends, objection thereto was waived, where not taken by demurrer or answer.

130 Cal. 521-526. WALES v. PACIFIC ELEC. MOTOR CO.

In Action by Mother for death of son, jury may consider loss suffered in being deprived of comfort, society, and protection of son, only for purpose of fixing pecuniary loss, pp. 523, 524.

Distinguished in *Dyas v. Southern Pac. Co.*, 140 Cal. 308, in action by widow and children for damages for death of employee, it was proper to instruct that in estimating pecuniary loss to plaintiff, loss of society, comfort and care, suffered by them in death of husband and father could be considered.

130 Cal. 531-532. OBERMEYER v. PATTERSON.

In Action to Enforce Lien of street assessment certificate of engineer that record in his office of another certificate shows that work of grading was found correct is inadmissible, pp. 531, 532.

Distinguished in *O'Dea v. Mitchell*, 144 Cal. 380, certificate of city engineer as to quantum of grading, and that work was done in accordance with lines and grades, is not defective because it does not state that engineer examined work or measured it.

130 Cal. 542-552. MURPHY v. PACIFIC BANK.

Where Insolvent Bank incorporated under act of 1862, claims of non-stockholding depositors are preferred to those of depositing stockholders, p. 549.

Approved in *Laidlaw v. Pacific Bank*, 137 Cal. 396, under act of 1862, section 10, nonstockholding depositors of insolvent bank in liquidation must be satisfied before any creditor should be permitted to apply any portion of assets to satisfaction of his debts, whether he be a stockholding depositor or general creditor.

129 Cal. 552-555. FIFIELD v. SPRING VALLEY W. W.

Storm or Freshet Waters are such water as flow down a stream dur-

ing and after a rain storm, and which are in excess of the ordinary flow, p. 553.

Approved in *California etc. Co. v. Enterprise etc. Co.*, 127 Fed. 743, increased flowage in stream, occurring annually, and lasting for three or four months, does not constitute storm or flood waters which may be impounded and used by any person.

Riparian Owner cannot enjoin water company from diverting flood waters of creek which will prevent flowing over his land of ordinary waters of stream, pp. 554, 555.

Approved in *Jones v. Conn*, 39 Or. 43, 45, where defendant's use of water for irrigating land was not sufficient to materially injure plaintiff who was lower riparian owner, fact that part of defendant's land irrigated could not be irrigated by ditches situated entirely on his own land, does not entitle plaintiff to enjoin defendant's use for irrigation.

130 Cal. 578-586. WALLACE v. FARMERS' DITCH CO.

In Action Involving Riparian Rights along stream, findings outside issues cannot support judgment, based thereon, pp. 579-584.

Approved in *Schirmer v. Drexler*, 134 Cal. 139, in action to enjoin interference with water rights of plaintiff where sole theory of complaint was that plaintiff had acquired prescriptive title to waters by adverse user, but findings were wholly outside issues, judgment will be reversed on appeal.

On Appeal from Judgment in action involving riparian rights, where findings are outside issues and judgment is uncertain as to height of dam that may be maintained, it must be reversed, p. 584.

Approved in *Walsh v. Wallace*, 26 Nev. 331, following rule.

130 Cal. 596-597. CAMENZIND v. KAMPFEN.

In Absence of Transcript disclosing who are attorneys of record, appeal will not be dismissed on stipulation without certificate of clerk, setting forth matter required by Rule VI, and date of entry of judgment appealed from, pp. 596, 597.

Approved in *Chevassus v. Burr*, 134 Cal. 435, refusing to dismiss appeal for failure to file transcript when clerk's certificate fails to state, and it does not otherwise appear who were attorneys for respective parties.

130 Cal. 597-600. WHITE v. WHITE, 80 Am. St. Rep. 150.

After Entry of Money Judgment in divorce, court cannot continue receiver for purpose of enforcing judgment, p. 599.

Approved in *Mau v. Kearney*, 143 Cal. 507, purchaser of farm at execution sale cannot, before expiration of time for redemption, bring ac-

tion to have receiver appointed to harvest and sell crop and apply proceeds toward satisfaction of judgment.

Sale Made by Receiver in divorce of property of husband after entry of money judgment is void, p. 599.

Approved in *White v. Costigan*, 134 Cal. 36, *arguendo*. Distinguished in *White v. Costigan*, 138 Cal. 566, in action by divorced wife to enforce conveyance from trustees of husband to whose rights she succeeded by receiver's sale, where complaint alleges that she succeeded to whatever interest her husband had in premises and is owner thereof, and the averment is not denied, validity of receiver's sale is not involved.

Trial Judgment in Divorce in which no power is reserved to render further relief, is conclusive, p. 600.

Approved in *Vance v. Smith*, 132 Cal. 512, where judgment on accounting of estate of deceased administrator with estate of which he had been administrator, was modified on appeal, judgment as so modified is final adjudication of rights of parties, and superior court cannot make any further order or judgment. Distinguished in *Eva v. Symons*, 145 Cal. 204, in ejectment where findings clearly negative defendant's claim and state that plaintiffs are owners and seized in fee of land, they are sufficient.

130 Cal. 621-626. ESTATE OF KRUGER.

Miscellaneous.—Estate of Kruger, 143 Cal. 147.

130 Cal. 631-637. SAN MATEO COUNTY v. COBURN.

Question whether uses for which property taken by eminent domain are public is judicial question for court, p. 634.

Distinguished in *Laguna etc. Dist. v. Chas. Martin Co.*, 144 Cal. 217, under act of 1885 taking of land of private owner by drainage district for ditch is not for private benefit of individual owners, but is taken for public benefit by public corporation, acting as agency for state for public use, and act is valid.

Whether Road is Demanded in particular region is determined exclusively by board of supervisors, and where it has acquired jurisdiction, its determination is not subject to review, p. 635.

Approved in *Pool v. Simmons*, 134 Cal. 625, in action to condemn land for ferry landing under franchise over river between two counties granted by board of supervisors of proper county, testimony to show ferry was not public use was inadmissible; *Glide v. Superior Court*, 147 Cal. 26, prohibition lies to enjoin Superior Court from proceeding with trial of suit to restrain supervisors from acting on petition to organize reclamation district.

130 Cal. 638-639. CURL v. CURL.

In Divorce Suit, question whether alleged conduct of wife had effect of causing husband mental anguish is for court, p. 639.

Distinguished in *Franklin v. Franklin*, 140 Cal. 609, court must find specifically upon issues of fact presented by complaint in divorce for cruelty, or judgment will be reversed.

130 Cal. 666-668. NICOLL v. WELDON.

Appellate Court will not Interfere with grant or refusal of new trial unless discretion is clearly abused, p. 667.

Approved in *Langford v. Langford*, 136 Cal. 509, and *Winchester v. Black*, 134 Cal. 127, both following rule; *Moore v. Thompson*, 138 Cal. 26, applying rule on appeal from order vacating order of dismissal for want of prosecution.

130 Cal. 678-682. PEOPLE v. WARREN.

It is Error to Instruct that one who aids or abets in crime may be punished as principal, but error is cured by instruction defining principals, p. 682.

Approved in *People v. Morine*, 138 Cal. 630, 631, though it is erroneous to use conjunctive words "aiding and abetting" in disjunctive form of "aiding or abetting" in instruction, error is cured by other instructions showing that word "aid" was not used in narrow and literal sense.

130 Cal. 683-686. PEOPLE v. WARREN.

Erroneous Instruction that persons who aided or abetted crime may be punished as principals is cured by correct instruction on subject of aiding and abetting, and as to burden of proof thereof, pp. 685, 686.

Approved in *People v. Warren*, 130 Cal. 682, following rule.



